IN THE

eme Court of the United States

October Term, 1960

NO 715

JOHN P. JENSEN

Petitioner

vs.

THE NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION,

Respondent

ON FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

JOSEPH T. VOTAVA
Service Life Insurance Building
Omaha, Nebraska

CHARLES B. PAINE
106 No. Logan
Grand Island, Nebraska

EDWARD H. PAINE, JR.
106 No. Logan
Grand Island, Nebraska

Counsel for Petitioner

LAW PUBLISHING CO., Omaha, Nebraska

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JOHN P. JENSEN,

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STATE OF NEBRASKA, EX REL NEBRASKA STATE BAR ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

Petitioner, John P. Jensen, hereby respectfully petitions for writ of certiorari to review the judgment and decision of the Supreme Court of the State of Nebraska, in suspending petitioner from the practice of law in said State for one year.

OPINIONS BELOW

The opinion of the Supreme Court is found in 171 Neb.

1; the unofficial reports of the opinion are found in 105 N. W. 2d 459, and 40 S. Ct. Journal pg. 1. It is marked Appendix 3 and attached hereto.

The opinion of the Referee is not found in any official or unofficial reports. It is marked Appendix 4 and attached hereto.

JURISDICTION

The opinion and judgment of the Supreme Court was entered on October 14, 1960. The motion for rehearing was overruled on November 28, 1960. The jurisdiction of this court is invoked under 28 U. S. C. Sec. 1257, (3).

QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

1. Can a State, consistent with due process, suspend an attorney from law practice on grounds, or for reasons, which were never pleaded and of which such attorney had no knowledge or notice until after completion of his hearing before a Court appointed Referee?

2. Can a State, consistent with due process, suspend an attorney from law practice where there is no evidence in the record that such attorney committed the offenses with which he was charged and of which he was found guilty?

3. Can a State, consistent with due process, suspend an attorney, where the Committee on Inquiry and the Advisory Committee, operating under Nebraska disciplinary practice, each violated such attorney's due process rights? It is not denied that actions taken by each of such Committees actually violated the attorney's rights here, but the Supreme Court's opinion sought to avoid any

adverse consequence, which might result from such violations, by contending such committees were preliminary only and that any wrong done to the attorney was cured by giving him a hearing before a Referee. Is such argument in avoidance valid where the Committees, or one of them, were the actual charging committees, and actually made determinations of probable cause, and actually had authority to dismiss the charges, and actually signed the complaint and actually were the body that removed the bars of secrecy and made public the charges against such attorney?

4. Can a State, consistent with due process, suspend an attorney, where the Committees, described in Item 3 above, violated the attorney's rights in many respects, including, but not restricted to, the following:

a) Members were disqualified, prejudiced, biased and interested.

b) One Committee prejudged the matter.

c) Evidence was considered which was not made available to attorney including (1) documentary evidence, and (2) interviewing an unsworn witness outside the attorney's presence and without his knowledge.

d) Committees repeatedly violated the Court rules under which the Committees functioned.

e) Found probable cause that attorney was guilty of offenses where there was *no* evidence to support the findings.

f) Received in evidence improper evidence although required to follow the rules of Civil procedure.

5. Can a State, consistent with due process, suspend an attorney where the Court appointed Referee:

a) Made conclusions which were not supported by any evidence.

b) Made conclusions of guilt of offenses not charged and of which attorney had no knowledge until *after* his trial.

c) Received, in toto, in evidence, over objection, the entire record, testimony and exhibits taken at a proceeding before the Committee on Inquiry, at which proceeding, without dispute, such attorney's rights of due process were repeatedly violated, and especially in view of the fact that a large part of the Referee's report and the Supreme Court opinion were based directly upon such improper evidence taken at such improper proceeding.

6. Can a State, consistent with due process, suspend an attorney where the judicial procedures followed repeatedly violated Court established rules for such procedures to such attorney's great prejudice?

7. Can a State, consistent with due process, suspend an attorney where the record establishes a "fundamental unfairness" in the use of evidence?

8. Can a State, consistent with due process, suspend an attorney where the record establishes that the procedures by which he was prosecuted denied to him the right of "fair play" which is the essence of due process?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV, United States Constitution, Section 1, Clause 2.

"* * * nor shall any State deprive any person of * * * liberty, or property without due process of law * * *."

STATEMENT OF THE CASE

John P. Jensen was admitted to the practice of Law in Nebraska in 1932 (R. 447). He has practiced law in Kearney, Nebraska, as a partner in the firm of Dryden and Jensen (R. 2407).

Under Nebraska Disciplinary procedure, charges of unprofessional conduct against lawyers can only be initiated as provided by Article XI of the State Bar Association Rules which have been approved by the Nebraska Supreme Court (See Appendix 1, hereof, par. 3). No complaint can be filed until charges are presented to the Committee on Inquiry and considered by the Advisory Committee (See Appendix 1, par. 11). Only if the Committee on Inquiry *finds* that there is *reasonable ground* to believe the attorney guilty of the *misconduct charged* are the files to be transmitted to the Advisory Committee (See, par. 7 b). If the Advisory Committee *determines probable cause* exists for disciplinary action, the charges are publicly filed; otherwise the matter *shall stand dismissed* (See par. 8). The rules also provide for hearing, after notice (See Par. 7 (a) and 8).

On February 21, 1957, in violation of the applicable rules, the Committee on Inquiry, without notice to Jensen and without hearing (R. Vol. 13 page 1994; Vol. 17 page 2369), prepared a verified complaint against Jensen and forwarded it to the Clerk of the Supreme Court for filing, pursuant to Sec. 7(b) of Article XI of Rules of Nebraska Bar Association, which rules are approved by the Nebraska Supreme Court (*In re: Integration of Nebraska State Bar*, 133 Neb. 283, as subsequently amended; see also 145 Neb. 1). The complaint was forwarded by the Clerk to the Advisory Committee, pursuant to the said rules (Par. 8, Art. XI). The Advisory Committee

through the Clerk of the Supreme Court then returned the charges directing that Committee on Inquiry to give Jensen a hearing, as provided by rules. The Clerk also informed the Committee on Inquiry that it had not made report of the disciplinary matters as required by Section 4C of Article XI of the Rules (R. p. 1995, pp. 1998, 1953, 1982).

On June 24, 1957, Jensen was first notified that complaints had been filed against him (R. 2406) and copy of complaint containing five counts was served on him. Throughout this brief these five counts will be referred to as follows: Count 1—the Vielehr matter; Count 2—the Molzen matter; Count 3—the Evans matter; Count 4—the Bentley matter; and Count 5—the Blue matter. Each of these counts, and the findings of the Referee, and of the Court, will be separately summarized beginning at page 11 hereof.

The facts relating to the raising of the various constitutional questions are summarized in Appendix 5.

Some further facts relating to due process of law violations of Jensen's constitutional rights are hereafter set forth, but others are mentioned elsewhere herein. These will generally be grouped chronologically.

A.

Facts relating to violations of due process of law by the Committee on Inquiry include the following:

1. Two of the three committee members, Randall and Nye, were each financially interested. Both had numerous cases pending of substantial importance in which Jensen represented opposing clients.

The Committee chairman, Randall, was directly interested in one of the five Counts charged against Jensen herein, namely the Blue matter. See page 20 hereof. Chairman Randall represented the employer in that matter; Chairman Randall communicated and negotiated with Jensen's client without Jensen's knowledge and knowing Jensen claimed to represent Blue; Chairman Randall filed charges against Jensen with himself; the employer profited in a substantial amount as a result of Chairman Randall's action against Jensen which had the effect of preventing Blue from recovering compensation to which he was entitled from Blue's employer, who was represented by Chairman Randall (R. 121 ff, R. 516 ff, R. 1225 ff).

Evidence disclosed threats by Nye, prior to hearing, that he was "going to get" Jensen (R. 768, 767, 666 to 667, 706).

2. The Committee prejudged Jensen's case, finding probable cause of his guilt even before it took testimony and even before it gave Jensen notice that charges were preferred against him. That first complaint of the Committee was signed and verified by all of the three persons who were the members of the Committee, two of whom later sat as the final Committee on Inquiry. The Committee's act in signing and forwarding the verified complaint proves that it found probable cause against Jensen before any notice had been given Jensen and no hearing had been held (R. 1992, 1994, 1995, 2368, 2369). See page 31 hereof.

3. The Committee on Inquiry considered evidence not available to Jensen. Prior to hearing, Chairman Randall disclosed to Jensen that he had a number of documents of

which Jensen saw only a few. Randall agreed to show all documents to Jensen, but later refused on instructions from the Clerk of the Supreme Court. None were shown to Jensen at Committee of Inquiry hearing, although demand was made. A few of those documents were finally produced when the deposition of the Clerk of the Supreme Court was taken prior to hearing before Referee. While positive identification of the balance of the documents held by Randall cannot be made because disclosure was denied, their production has been consistently refused. The Inquiry Committee and the Advisory Committee considered documents denied Jensen, a few of which were later disclosed and the rest of which have now apparently disappeared, as is shown by the fact that they have not been produced, although demanded (R. 734-737; 1224; 1225; 640).

4. The Committee on Inquiry violated applicable procedural and evidentiary rules. The Committee violated rules which controlled it as follows:

a) The Committee failed to make reports as required, (1995; 1953; 1982; Ex. 32), which resulted in an accumulation of charges over a period of many years.

b) The Committee failed to keep proceedings secret (R. 755; Rules, Sec. 10, Article XI, Appendix 1), to Jensen's great prejudice.

c) The *Priebe* case record was received, in toto, in evidence, by the Committee over objections and to Jensen's prejudice (R. 1439), and in violation of the Nebraska Rules of Civil procedure, and the record contained much inadmissible hearsay evidence, non-admissible findings, prejudicial obiter dicta in Court findings and other prejudicial matters, not binding on Jensen. Both the Referee and the Supreme Court

relied heavily upon this improperly received record in their comments on the *Evans* matter as shown by their findings and conclusions.

d) The Committee changed membership in the middle of the proceedings, in a manner that was contrary to rules, and thereby removed an unprejudiced, financially disinterested, committee member and replaced him with a prejudiced, financially-interested person (See Rules Sec. 1, Article XI, Appendix 1, R. 709 to 714; 732; 657).

B.

After completion of Committee on Inquiry hearing Jensen, on October 17, 1957 (R. 2409), filed a petition with the Advisory Committee, in which petition he raised many matters, including specifically the disqualification of membership of Committee on Inquiry and violation of his rights to due process.

The facts, briefly, which relate to violations of due process by the Advisory Committee include the following:

1. The Advisory Committee considered the unsworn testimony of at least one person, namely, Baburek, whose testimony was taken outside of presence of Jensen and without his knowledge (R. 270, 271, 274). It is unknown how many other witnesses that Committee also interviewed in violation of Jensen's due process rights.

2. The Advisory Committee refused (Sec. 8, 9, 14, Art. XI) to consider Jensen's request for disqualification or to consider procedural matters (Ex. 69, 70, R. 2444).

3. The Advisory Committee abdicated its authority; and after finding no probable cause as to the *Evans* Count, which charge, therefore, according to the rules, stood dis-

missed, improperly permitted the biased and interested Chairman of the Committee on Inquiry to force the return of that charge in the complaint against Jensen, to his great prejudice.

C.

After the public filing in the Supreme Court of Nebraska, as an original action, of the complaint against Jensen, this matter was referred to a Referee, who subsequently held a hearing.

The Referee violated Jensen's guaranteed rights of due process as follows:

1) Jensen's right to Connors' testimony was denied him by Referee. Connors had investigated Jensen for State. When his deposition was taken, he refused to answer, on the ground of privilege, questions relating to production of documents in his possession, questions relating to the alleged offenses of Jensen and questions relating to conferences he had had with persons listed by the State as witnesses on its behalf. Motions, both prior to and at trial, for the documents and testimony were denied (R. 12). Jensen was barred from obtaining evidence to which he was entitled.

2) The Referee violated applicable, procedural and evidentiary rules.

3) The *Priebe* case record was received, in toto, in evidence by the Referee over objections and to Jensen's prejudice (R. 16) and in violation of the Nebraska Rules of Civil procedure and that record contained non-admissible hearsay evidence, non-admissible findings, prejudicial obiter dicta in court findings and other prejudicial matter not binding on Jensen. Both the Referee and the

Supreme Court relied heavily upon this improperly received record relative to the *Evans* matter.

4) Referee received in evidence and over objection, the entire proceedings of the Committee on Inquiry (R. 208, 209). Undenied constitutional errors in Inquiry Committee proceedings were claimed, by Nebraska Court, to have been cured by proceedings before Referee, yet the Supreme Court rested its decision on this same prejudicial and improper evidence when wrongly made a part of the testimony before the Referee. Invalid testimony does not become valid by being improperly received over objection in another Court.

D.

This matter was referred to the Supreme Court upon the Report of the Referee and Jensen's exceptions thereto.

E.

Having chronologically and briefly outlined the proceedings brought against Jensen, a short statement concerning each of the charges will be set forth, showing the essential substance of each Count, the Answers and Replies, the Evidence and Conclusions of the Referee and the Opinion of the Court.

Count No. 1. The Vielehr Matter

COMPLAINT: "A deposition was taken of Vielehr * * *. Jensen was present during the taking * * *. This deposition was then made an exhibit by Mr. Jensen and entered in evidence * * *. Such testimony involved a material issue and was false * * * which (Jensen) well knew."

ANSWER: Jensen admitted that the direct testimony of

deponent was in part false; he alleged that all of the cross examination was true, and that he, Jensen, offered in evidence none of the direct testimony, but only the true cross examination (Answer, par. 5 sub. par. 14).

REPLY: State specifically admitted the truth of such allegations of Jensen's Answer (Reply par. II sub-par. 5).

EVIDENCE: There was *no* evidence that Jensen offered any of the false testimony in evidence. There was *no* other offense pleaded. As the State admitted, *all* evidence established that Jensen did *not* enter any false testimony in evidence.

REFEREE'S CONCLUSIONS: Despite the foregoing, the Referee made 4 conclusions of law as follows:

1) That Jensen filed the deposition, knowing it contained perjured and material testimony.

COMMENT: That offense was *not* pleaded. The evidence does not establish that any of the false evidence constituted perjury. The undisputed evidence does establish that Jensen did *not* file the deposition.

2) That Jensen "sat by silently and permitted client to commit perjury."

COMMENT: That offense was *not* pleaded. The undisputed evidence shows that the witness *not* a client of Jensen in that matter and that Jensen actually *did* instruct the witness to testify truthfully.

3) That Jensen "did not make a full disclosure to opposing Counsel and Court."

COMMENT: That offense was *not* pleaded. The undisputed evidence discloses that disclosure *was* actually made to *both* opposing counsel *and* Court, *prior* to trial.

4) That Jensen "neglected and failed to give notice to * * * prosecuting authorities."

COMMENT: That offense was *not* charged. The undisputed evidence discloses that Co-Counsel actually *did* give such notice to such authorities.

COURT'S OPINION: The Nebraska Supreme Court did *not* discuss the pleaded charge, or any of the Referee's conclusions, and made no specific finding thereon.

Count No. 2, The Molzen Matter

COMPLAINT: Jensen was attorney for a plaintiff, Mrs. Molzen, in a divorce proceeding, wherein a divorce decree was entered which included the proviso, "Plaintiff's attorney is given a lien on amounts due and owing from defendant to plaintiff in the amount of 15 percent." No request was made for such proviso in the pleadings. "District Court, on motion of plaintiff, and over objection by defendant, struck said proviso from * * * decree."

ANSWER: Jensen admitted the allegations and alleged that he had *no* fee arrangements up to date of trial with Mrs. Molzen. Jensen consulted with his client, Mrs. Molzen, advising her of the fees and that he would ask the Court that he be given a lien of 15 percent. The attention of the court was called to said lien clause, in open court, when all concerned were present. Later, on motion, the Trial Court found there had been *no* pleadings or evidence relative to fees and the lien pro-

vision was stricken from decree, however reserving Jensen's statutory lien.

REPLY: State admits that *no fee arrangement* had been made up to the date of the trial between Molzen and Jensen.

EVIDENCE: There was *no* evidence of any contract for fees of any kind between Molzen and Jensen. The *undisputed* evidence established that (1) Molzen pleaded she had *no* fee contract with Jensen; that (2) Jensen testified he had *no* fee contract with Molzen; that (3) the District Court, in an unappealed from Order, found and decreed that Molzen and Jensen had *no* fee agreement.

REFEREE'S CONCLUSIONS: Despite the foregoing, the Referee made five conclusions of law as follows:

1) Jensen had a contract for a contingent fee with Mrs. Molzen.

COMMENT: That offense was *not* pleaded. The *State judicially admitted* there was *no* such contract; there was *no* evidence of any such contract in the record; and the District Court, on hearing, found there was *no* agreement for fees between Jensen and Molzen.

2) Referee found Jensen agreed on fee of $150.00, but collected more.

COMMENT: That offense was *not* pleaded; there was *no* evidence at all in support of this. See also the facts and comments set forth above.

3) Referee found Jensen collected fees in connection with $1000.00 of property settlement for which no work performed.

COMMENT: That offense was *not* pleaded, *no* evidence at all in support of this.

4) Referee found client had to employ attorney to represent her as result of Jensen's persistent effort to collect fee.

COMMENT: That offense was *not* pleaded and *undisputed* evidence established fee as reasonable and there is *no* evidence to the contrary.

5) Referee found Jensen failed to discuss 15 percent lien with Court before decree was entered.

COMMENT: That offense was *not* pleaded, and *undisputed* evidence was that the Court read decree, and that its attention had been called to 15 percent lien clause in open court *before* decree was signed.

COURT'S OPINION: The Nebraska Supreme Court, in its opinon, found: 1) That Jensen and Molzen had a contract for a contingent fee because "It is apparent that the Respondent was basing his percentage on the total amount of alimony awarded * * *. This is wrong and unethical."

COMMENT: The Court's logic and reasoning is patently falacious; a play of words does not alter or make facts. Supreme Court *admits*, in its opinion, that the Trial Court had actually found that Jensen and Molzen had *no* agreement for fees. Obviously, if there was *no agreement for fees*, there also was *no agreement for contingent fees*. The Supreme Court failed to mention in its opinion that *both* Jensen and Molzen, who were the only parties involved, stated there was *no fee agreement* between them. The Supreme Court also failed to note the *judicial admission* by the *State*

itself, that *no fee arrangement* existed between Molzen and Jensen.

2) That Jensen committed, "A form of fraud on the District Court by failing to fully inform the Judge" as to the lien provision in the decree.

COMMENT: *All* evidence conclusively established that the 15% clause *was* actually called to the Judge's attention and the Supreme Court itself admits that the trial Judge read the decree. There is *no evidence* to support the Court's finding.

3) The Supreme Court does *not* specifically approve the other findings of the Referee, being conclusions No. 2, No. 3, and No. 4 of the Referee, nor does the Court specificaly refer to them.

Count No. 3, The Evans Matter

COMPLAINT: Jensen "drew a * * * will for * * * Evans which he retained." On September 14, 1951, Mrs. Evans and her son, Franklin demanded the will, which Jensen refused to give her.

ANSWER: Jensen alleged that, prior to September 14, 1951, Mrs. Evans had specifically instructed him *not* to give her will to her, unless she came *alone* for it. On September 14, 1951, Mrs. Evans was accompanied by others; also at that time she was under Court Conservatorship. Prior to refusing to give up the Will, Jensen sought the advice of a disinterested, independent Counsel, who advised Jensen not to give up the Will, which advice was thereafter confirmed by other attorneys.

REPLY: State admitted all of the above allegations, except Mrs. Evans' instructions and the advice of Coun-

sel to Jensen not to give up the Will.

EVIDENCE: Mrs. Evans' instructions to Jensen that he should not give her will to her, unless she came alone for it, were established by the testimony of the minister of Mrs. Evans' church who was present and heard Mrs. Evans give those instructions to Jensen, and by Jensen's two partners and by a disinterested attorney. Mrs. Evans could not testify as she had died about two years *before* Jensen was notified of this charge. The advice of Counsel was established by several witnesses, including the testimony of the attorney who gave Jensen the advice that he should not give up the will because it would violate his client's instructions. There was *no* evidence that Mrs. Evans did not give Jensen the instructions, as alleged, or that Jensen violated her instructions by not giving up the will, or that Jensen was not advised by independent counsel, that he should not give up the will on that occasion. The evidence also showed clearly why Mrs. Evans gave her instructions to Jensen. It was an effort on her part to prevent her children from coercing her into changing her will, which purpose was ultimately defeated.

REFEREE'S CONCLUSIONS: Referee made *no* conclusions of law that the above evidence was not correct; he merely repeated obiter dicta from the case of *Jensen v. Priebe*, 163 Neb. 481, 80 N. W. 2d 127, which action was a proceeding to probate the will of Mrs. Evans and in which matter no issue was pleaded as to Jensen's refusal to surrender Mrs. Evans' will on September 14, 1951, and the admission of which in evidence was improper, and which record was prejudicially received over objections.

COURT'S OPINION: The Supreme Court stated that Jensen *had* testified to Mrs. Evans' instructions to him, but it did *not* recite any evidence to the contrary and did *not* find that the instructions were not given, merely saying in its opinion, "there is no legal or logical reason why Jensen should not have given Mrs. Evans her will." As the Court did not find that Mrs. Evans did not give Jensen instructions not to give her will to her unless she came alone for it, we find the amazing situation that the Nebraska Supreme Court has actually disciplined Jensen for following literally his client's lawful instructions to him and we find the equally amazing statement that strict compliance by an attorney with his client's lawful instruction is not a "logical or legal reason" for Jensen's action. There was *no* competent evidence that Jensen, in refusing to give up the will to Mrs. Evans on September 14, 1951, was not complying strictly and literally with her express instructions to him.

Count No. 4, The Bentley Matter

COMPLAINT: Jensen was attorney for a son who applied for guardianship for his mother, Mrs. Lillian Bentley, who was represented by Attorney Minor. Jensen * * * "without the consent or invitation of Lillian Bentley or her attorney * * * entered the Bentley home for the purpose of taking the statement of said Lillian Bentley."

ANSWER: Jensen admitted going to Lillian Bentley's home but alleged it was at the express request of Lillian Bentley and was also with the express consent of Lillian Bentley's attorney, Minor. He alleged he did *not* see or communicate with Mrs. Lillian Bentley.

REPLY: A general denial.

EVIDENCE: There was *no* evidence that Jensen, on that occasion, saw or communicated with Mrs. Bentley. A Deputy Sheriff, testifying for the State, establishe that Mrs. Bentley requested Jensen to talk to her. The *State itself* offered the testimony of three witnesses relating to whether Jensen had the consent of Mrs. Bentley's attorney to see her. The State offered Jensen's testimony that Minor had twice given his express consent (R. 508, 509, 559). The State also offered the testimony of one Wetovick, to the same effect (R. 428, 429, 1324, 1330). The first two witnesses were *never* impeached. Minor was impeached (R. 662, 664, 665, 225, 666). Where the State, itself, offers diametrically opposing testimony and where unimpeached testimony is favorable to accused and where impeached testimony is unfavorable to him, the State has not established its case under Rules of Civil Procedure. See page 28 hereof). There was *no* evidence of communication or negotiation in violation of Canon 9.

REFEREE'S CONCLUSION: Found violation of Canon 9.

COMMENT: Violation of Canon 9 was *not* pleaded or proven. It was not alleged and it was not proved that Jensen either communicated or negotiated with Mrs. Bentley on the subject of the controversy.

COURT'S OPINION: Jensen "violated the Code of Professional Ethics by his conduct as determined by the Referee."

COMMENT: Court's finding of violation of Canon 9 was neither pleaded or proved for reasons stated above.

Count No. 5, The Blue Matter

COMPLAINT: Jensen "* * * purported to represent * * * Blue * * * on a Workmen's compensation claim * * * and wrote a letter to Blue's employer" making a claim for compensation, "* * * when, in fact, Blue * * * did not authorize * * * such a letter."

ANSWER: Jensen admitted he wrote such a letter which was the statutory notice an employee must, within a specified time, give to his employer to preserve his rights in such a case. Jensen alleged that Blue consulted him, employed him, authorized the letter and later ratified its sending.

REPLY: Admits Blue consulted Jensen.

EVIDENCE: Blue, testifying for the State, admitted that he consulted Jensen (R. 1524); that he employed him (R. 1231, 1232, 1233, 173, 1250, 141, 59, 593, 127, 128); that he left his papers with Jensen; that Jensen explained his compensation rights to him (R. 149, 150, 1251); that Jensen told Blue that a statutory notice would have to be sent to Blue's employer (R. 173 to 176, 1252, 132); that he knew Jensen would make a claim for him against his employer (R. 154); that after the letter notice was sent, he, Blue, had a number of conferences with Jensen and was examined by a Doctor, according to arangements made by Jensen, and never once did Blue tell Jensen he should not have sent the letter notice to Blue's employer (R. 520, 521, 524, 594, 2061). Jensen's testimony was to the same effect as Blue's (R. 150, 151, 158, 1243, 1244, 1248). There was *no* witness who testified differently. One disinterested witness testified that Blue had told him that he, Blue, employed Jensen to represent him on his compensation claim against his employer (R. 634 to

635, 636, 637).

REFEREE'S CONCLUSIONS: Jensen "without authority from Blue and contrary to his wishes, wrote * * * the alleged letter."

COMMENT: There was *no* competent evidence to support such finding.

COURT'S OPINION: The Court did not refer to or discuss the complaint or the Referee's conclusion and made *no* specific finding with reference to it.

Concerning Supreme Court's General Findings

As pointed out above, the Supreme Court discussed specifically only three of the five counts, saying nothing about the *Vielehr* and the *Blue* matters. The Court did, however, state this:

> "We have herein set forth certain of the charges against the Respondent made by the relator in the complaint. We have carefully reviewed the record as it relates to all of the charges set forth in the complaint. The record shows that the Respondent has failed to demonstrate loyalty and fidelity to his clients and to meet the trust placed in him by them. In addition, in the practice of his profession he has not shown fairness and candor in his dealing with other lawyers, and has not dealt candidly with the facts in cases handled by him. It is also apparent from the record that the respondent has failed to uphold the honor and dignity of the legal profession." (This petition, Appendix 4).

From an examination of the record it is apparent that none of these new offenses were charged or pleaded. Jensen had no knowledge of them until the opinion of the Supreme Court was released. Those charges are not inherent or implicit in the 5 pleaded counts. No facts are

stated upon which such conclusions were based. We submit that there is no evidence in the record to support or sustain the language of the court.

We challenge this Court's attention to the fact that a comparison between the Counts of the complaint and the opinion of the Nebraska Supreme Court will demonstrate a striking variance between the purported offenses charged in the complaints, and the Court's conclusions of guilt as expressed in the opinion. The necessity for clarification of the Counts of the Complaint, so obvious now from such comparison, demonstrates the error of the Supreme Court in summarily overruling, on the date of the filing, Jensen's motion to make definite and certain said counts of the complaint.

REASONS FOR GRANTING THE WRIT

Introduction

Mr. Justice Black said as to physicians, in *Barsky v. Board of Regents*, (1954) 347 U. S. 442, 459; 98 L. Ed. 829, 843; 74 S. Ct. 650:

> "The right to practice is, as Mr. Justice Douglas shows, a very precious part of the liberty of an individual physician or surgeon. It may mean more than any property. Such a right is protected from arbitrary infringement by our Constitution, which forbids any State to deprive a person of liberty or property without due process of law. Accordingly we brought this case here to determine if New York's action against Dr. Barsky violates the requirements of the Federal Constitution."

That language of Mr. Justice Black is equally applicable to lawyers and we trust that such action, thus referred to in the *Barsky* case, will also be taken here for the reason so well stated in that case.

Point I.

There is absolutely no evidence in the record to support Jensen's conviction as to 4 out of the 5 offenses of which he was found guilty.

Five counts were pleaded, purporting to charge Jensen with unprofessional conduct.

There is *no* evidence in the record that supports conviction of Jensen as to 4 out of 5 of these purported offenses.

In *Thompson v. Louisville* (1960), 362 U. S. 199, 206, 4 L. Ed. 654, 659, 80 S. Ct. 624; this Court said:

> "It is a violation of due process to convict and punish a man without evidence of his guilt."

To the same effect see also *Thornhill v. Alabama*, 310 U. S. 88, 96, 84 L. Ed. 1093, 1099, 60 S. Ct. 736.

In Count One, (*Vielehr*) Jensen was charged only with knowingly offering in evidence false testimony. The state itself, in its pleadings, admitted that Jensen did not offer false testimony in evidence and *all* the evidence so established. There is *no* evidence to the contrary. The Nebraska Supreme Court did not comment on the evidence nor make any *specific* finding against Jensen as to this Count but only by a generalization implied that Jensen was guilty of this offense.

In Count Two, *(Molzen)* Jensen was charged with including, in a divorce decree, a provision for a lien, which later, on motion, was stricken. This Count obviously does not charge any offense. The alleged fact was admitted by all parties. However, Jensen was not found guilty of incorporating a lien provision in a divorce decree. After

he had been tried, he discovered, for the first time, from the Referee's Report, that he was found guilty of five offenses, none of which had been pleaded. The two offenses the Supreme Court found him guilty of were (1) making a contingent fee contract with his client in a divorce action, and (2) of committing "a form of fraud" on a trial court. Neither of these offenses were pleaded.

Did Jensen and Molzen enter into a contingent fee contract? The answer is emphatically "no." Mrs. Molzen pleaded that she and Jensen had *not* entered into a fee contract; Jensen testified he and Molzen had *not* entered into a fee contract; the trial court, wherein the divorce action was tried, in an unappealed from decision, found there was *no* fee contract; the State, itself, judicially admitted in its reply that Jensen and Molzen had *not* entered into a fee contract, and there is *no* evidence in the record that there was such a contingent fee contract.

As to the "form of fraud," we point out that "the form of fraud" to which the Court referred was never identified by the Court and since *no* fraud was ever pleaded, and since Jensen had *no* knowledge until after his trial that it was being claimed that he had defrauded anyone, the phrase is hard to pin down; however, it now appears to consist of Jensen failing to "fully inform the Judge as to its (the lien) provision." The Nebraska Supreme Court expressly admitted in its opinion, that "It may be assumed" that the trial Judge read the decree in question. That is a safe assumption for the Court, because *all* the evidence establishes that *not only* did the trial Judge *read* the decree, but that the lien provision *was* expressly called to the Court's attention. There is *no* evidence to the contrary. Actually Judge Reed, the District Judge, who heard this matter, was in the Court room during part of

Jensen's trial before the Referee, but the State never called him to the stand to testify how he was defrauded, and Jensen did not call him, because fraud on Judge Reed had not been pleaded, and Jensen did not know fraud on Judge Reed was claimed.

In Count Three, (*Evans*) Jensen was charged with not returning a Will to his client, Mrs. Evans, upon her request for it, on a specified occasion, when others were present. Jensen's chief defense was that when his client, Mrs. Evans, left her will with Jensen, she specifically instructed Jensen *not* to give it back to her *at any time unless she came alone* for it. There was *no* evidence contradicting or inconsistent with those instructions. The instructions were established by many witnesses. Neither the Committee of Inquiry, or the Advisory Committee, or the Referee, or the Nebraska Supreme Court, has ever disputed those instructions, or even implied that they were not given. Despite such undisputed instructions, Jensen was found guilty of wrongfully withholding the will at a time, when his client came *with others* to get it. Jensen's client died about two years before Jensen had any knowledge that this charge was made against him, so he was deprived of her testimony in his behalf, although Mrs. Evans lived about three years after the incident.

In Count 5, (*Blue*) it was alleged that Jensen "purported to represent" a man, named Blue "on the Workmen's Compensation claim" and wrote to Blue's employer presenting Blue's claim for permanent partial disability, without authority from Blue. *Both* Blue and Jensen testified that Blue *had* employed Jensen to represent him in this matter; that Blue *knew* Jensen was going to write Blue's employer making such claim; that Jensen had arranged for Blue's examination by a Doctor; that Blue

and Jensen consulted together both before and after the letter had been sent; and that Blue *never* repudiated the letter; and that Blue *never* told Jensen he should not have sent it. Blue testified he knew the next day after the letter was sent, that such letter had been sent by Jensen. A written statement of Blue, taken by Jensen, the first time Blue consulted Jensen, established employment of Jensen by Blue. A disinterested third party testified that Blue told him he had employed Jensen to represent him in this matter. *No* witness testified that Jensen lacked authority to write the letter. The Supreme Court did not comment on the evidence nor make any specific finding against Jensen.

There is absolutely *no* evidence in the record that sustains Jensen's conviction on the *Vielehr, Molzen, Evans* and *Blue* counts. Under the authority of the *Thompson* and *Thornhill* cases, supra, the Nebraska decision violated Jensen's right to due process by convicting him without any evidence of his guilt.

Point II.

Jensen was wrongfully found guilty of unprofessional conduct as to Count Four (Bentley).

As has been shown above, under Point I there is *no* evidence in the record which supports Jensen's conviction on 4 out of 5 of the Counts. It is appropriate now to examine the last of the 5 counts, designated as Count 4, the *Bentley* matter. It will be quickly observed the Nebraska decision here also is equally violative of Jensen's rights to due process of law.

Jensen represented a son, in 1953, who brought a guardianship proceedings against the son's mother, Mrs. Bentley. The mother was represented by attorney, Minor.

Jensen was charged with going to the Bentley home to take a statement from Mrs. Bentley without her request and without consent of her attorney, Minor.

The *admitted and established facts* are that, Jensen, went to Mrs. Bentley's residence; that Mrs. Bentley *did* request that Jensen come to her home to talk to her; that Jensen did *not* see or talk to Mrs. Bentley.

The *only* fact in dispute is whether Jensen did or did not have the consent of Minor. As to this question it is most significant that the *State itself*, offered the testimony of Jensen, Minor and one other witness. The testimony of Minor was that he did not give consent or at least that he had no recollection of it. The testimony of both of *the other two witnesses for the State* was strongly, that Minor, on two occasions, actually gave his consent to Jensen to see Mrs. Bentley. This testimony was also corroborated by other circumstances.

Neither the Referee *nor* the Supreme Court found that Jensen ever communicated or negotiated with Mrs. Bentley, but instead, in general language, they found Jensen guilty of violation of Canon 9. However, Canon 9 condemns *actual* communication or negotiations, and Jensen did *not* communicate or negotiate with Mrs. Bentley.

Note the following:

1. The pleaded count alleges Jensen's *only* offense to be a journey to the Bentley home to get a statement without her consent.

2. The facts established that although such a journey was made, it was made at Mrs. Bentley's express request; that Jensen did not take, or intend to take a statement of Mrs. Bentley. He started to the Bentley house at Mrs.

Bentley's express request, but expected to get statements of other witnesses whom he expected to find there. However, Jensen did *not* then see Mrs. Bentley, and he did *not* communicate with her and did *not* negotiate with her. He left the premises upon the request of Mrs. Bentley's husband.

3. The evidence of the *unimpeached witnesses offered by the State* establish that Jensen had the actual consent of Minor to see Mrs. Bentley. Minor was impeached. Under such circumstances Jensen's due process rights were violated and his conviction cannot properly stand. See the following authorities:

State v. Haynes, (1943) Ida., 135 Pac. 2d 300, 301.
Young v. State, (1954) Okla., 275 Pac. 2d 358, 369.
People v. Micosia, (1937) 298 N. Y. S. 591, 597.
Wheelock v. Freiwald, 66 Fed. 2d 694, citing 5 United States cases in support of the rule.

4. *All* evidence establishes that Jensen did *not* do those acts that are condemned by the Canon 9 and of which he was found guilty.

Point III.

Conviction on a charge not made is a violation of due process of law.

The above stated rule is so well established that only a few authorities so holding are cited above.

In *Thompson v. Louisville*, 362 U. S. 199, 206, 4 L. Ed 654, 659, 80 S. Ct. 624, the opinion states:

> "* * * conviction upon a charge not made would be sheer denial of due process."

In *DeJonge v. Oregon*, (1936) 299 U. S. 353, 362, 81 L.

Ed 278, 282, 57 S. Ct. 255, the opinion states the rule in the same words as are quoted above.

In *Parr v. U. S.*, (1960) 363 U. S. 370, 394, 4 L. Ed. 2d 1277, 1292, 80 S. Ct. 1171, it is said, in Syl. 17:

> "* * * no man, however bad his behaviour, may be convicted of a crime of which he was not charged, proven and found guilty in accordance with due process."

The Nebraska Supreme Court itself claims to apply this rule. In the case of *State v. Fisher*, 170 Neb. 483, 103 N. W. 2d 325, it says:

> "In a disciplinary proceeding only those matters which are specifically charged in a complaint can be considered."

Various cases are cited in support.

In this case, Jensen has been found guilty by the Referee and has been convicted by the Supreme Court of many offenses which were not pleaded. In each such instance, Jensen's rights to due process were violated. Let us summarize:

Count 1 - the *Vielehr* matter: *None* of the 4 conclusions of the Referee were pleaded.

Count 2 - the *Molzen* matter: *None* of the 5 conclusions of the Referee were pleaded and *neither* of the 2 findings of the Supreme Court were pleaded.

Court 4 - the *Bentley* matter: *Neither* the conclusion of the Referee *nor* of the Supreme Court was pleaded.

Catch-all generalizations of guilt by Supreme Court: *None* were pleaded.

Point IV.

The Nebraska Supreme Court has resolved certain questions involving due process in a way that is inconsistent in principle with decisions of this Court.

A.

The right to practice law is a right protected by the Federal Constitution and may not be taken away by any State, except by a proceeding that conforms to the essential requirements of due process.

Ex parte Robinson, 86 U. S. 505, 512; 22 L. Ed. 205.
Ex parte Garland, 71 U. S. 333, 379; 18 L. Ed. 366; 56 S. Ct. 482.
Goldsmith v. Board of Tax Appeals, 270 U. S. 117, 123, 70 L. Ed. 492, 494; 46 S. Ct. 215.
In Re: Carter, 177 F. 2d 75, 78, (D. C. Cir.) Cert. denied 338 U. S. 900; 94 L. Ed. 554; 70 S. Ct. 250.
Matter of Los Angeles County Pionner Society, 217 F. 2d 190, 193 (9th Cir.).
In Re: Carter, 192 F. 2d 15, (D. C. Cir.) Cert. denied 342 U. S. 862; 96 L. Ed. 648; 72 S. Ct. 89.
Laughlin v. Wheat, 95 F. 2d 101 (D. C. Cir.).
United States v. Hicks, 37 F. 2d 289 (9th Cir.).
Koenigsberg v. State Bar of California, 1957, 353 U. S. 252; 1 L. Ed. 2d 810, 77 S. Ct. 722.
Schware v. Board, 1957, 353 U. S. 232, 238; 1 L. Ed. 2d 796; 77 S. Ct. 752.
In re: Noell, (1937) (C. A. 8), 93 Fed. 2d 25.

The foregoing cases establish clearly the rule that the entire processes and procedures for disciplining a lawyer are judicial in nature and none of such processes or procedures can deny to an attorney on trial, his constitutional rights and his guarantee of due process.

The chronology of events in this proceedings of Jensen is briefly as follows:

1. A Committee on Inquiry wrongly prejudged Jensen's case by making a determination against Jensen of probable cause, without notice to Jensen, and without Jensen having any knowledge of any hearing.

2. Such prejudged determination was reviewed by the Advisory Committee in Nebraska, who returned the proceedings to the *same* Committee on Inquiry that had already judged Jensen guilty without notice and without hearing. See *In Re Murchison*, 349 U. S. 133, 137, 99 L. Ed 942, 946, 75 S. Ct. 623.

3. The Committee on Inquiry then gave notice and went through the form of a hearing. A review of the record shows that that body had already prejudged the case. It reveals the shocking violations and disregard for controlling Supreme Court rules, for applicable rules of civil procedure; and for Jensen's guaranteed rights of due process. Some of the violations are as follows:

a) Although that Committee on Inquiry had prejudged Jensen's case, nevertheless it again sat in judgment even over objection.

b) Two of three members of the Committee on Inquiry were biased and prejudiced.

c) Two of the three members of the Committee on Inquiry were financially interested in litigation with Jensen.

d) The Chairman of the Committee represented the employer involved in Count 5, the *Blue* matter, and as a result of his action in this case against Jensen, cost Jensen's client several thousand dollars and saved the employer several thousand dollars.

e) The personnel of the Committee on Inquiry was switched during the proceedings and, contrary to the rules, so as to remove a disinterested member and add an interested and biased member.

f) The Committee considered evidence which was not disclosed to Jensen after demand for the same.

g) The Committee at first promised to let Jensen inspect pertinent documents, then later refused to give Jensen these documents and files which pertained to this matter, after demand, and to which Jensen was entitled.

h) The Committee repeatedly violated the rules of procedure for this proceeding which had been established by the Nebraska Supreme Court.

i) Although the Committee was required to follow the Rules of Civil Procedure of Nebraska, it violated such rules in numerous instances, which violations were material and prejudicial.

j) The Committee found there was probable cause to believe Jensen guilty of counts that charged no offense.

k) The Committee found there was probable cause to believe Jensen guilty of counts, although there was no evidence to support such findings.

4. The Committee on Inquiry, after the so-called hearing, again found probable cause, and the matter was referred again to the Advisory Committee.

a) A request was made by Jensen to the Advisory Committee to review the violations of due process committed by the Inquiry Committee, and although authorized by the rules to do so, the Advisory Committee refused to do so and denied this right to Jensen.

b) The Advisory Committee also considered evidence

not available to Jensen; it interviewed at least one witness, outside of Jensen's presence, who was not sworn, and was not subject to cross examination, and without Jensen's knowledge. These facts are shown without contradiction by the record.

c) The Committee found there was probable cause to believe Jensen guilty of certain counts that charged no offense.

d) The Committee found there was probable cause to believe Jensen guilty of certain counts although there was no evidence to support such findings.

5. The applicable rules provide that "If the Advisory Committee *determines* that no probable cause for disciplinary action exists * * * *the matter shall stand dismissed* * * *." The Advisory Committee found no probable cause for action existed as to Count 3—the Evans matter, and that Count, under the rules, stood dismissed. However, at the insistence of the Chairman of the Committee on Inquiry, who is shown to have been biased and prejudiced against Jensen and an interested party, the Advisory Committee then changed its determination and report and permitted the inclusion of the Evans charge at the insistence of such prejudiced and interested Chairman.

6. Thereupon there was filed in the Supreme Court, the Complaint which had been prepared and signed by the prejudiced and interested members of the Committee on Inquiry, thus make public officially for the first time, the charges against Jensen. Under Nebraska procedure, this action, in effect, constituted a determination of probable cause, determinations to make public charges, and the execution of such determinations, and judgment by the public filing of such charges, such determinations

having been made by both committees.

7. This matter was referred to a Referee by the Supreme Court of Nebraska, and the Referee took evidence. At the hearing before the Referee, the State, in a blanket offer, offered all of the testimony and exhibits, which had been introduced before the Committee on Inquiry. Jensen objected, but the testimony and exhibits were received. The opinion of the Supreme Court and the Report of the Referee were both largely based upon the exhibits and testimony taken before the Committee on Inquiry and which were received by the Referee over objections.

We submit that the following conclusions are sound, based upon the above facts.

a) The proceedings before the Committee on Inquiry and before the Advisory Committee were both judicial in nature and had to conform to the requirements of due process.

b) Both the Advisory Committee and the Committee on Inquiry made determinations in the nature of adjudications affecting the legal rights of Jensen, and for that reason also their proceedings must conform to the requirements of due process. Cases and further comment in support of this are cited on page 42 of this brief.

c) Furthermore, the Committee on Inquiry proceedings were void by reason of violation of due process, and that invalidation also infected the proceedings before both the Referee and the Supreme Court, so that such subsequent proceedings, being based upon the invalidated proceedings of the Committee on Inquiry, were themselves invalidated.

The above three contentions were presented to the Supreme Court of Nebraska. The first two were discussed in its opinion. The last one was ignored by the Supreme Court and was not discussed by it.

As to the first two contentions, the Supreme Court of Nebraska said:

> "It is clear that the preliminary proceedings before the Committee on Inquiry and the Advisory Committee were merely investigating proceedings which neither end in any decree or establish any right." (This petition, Appendix 4).

We submit that such is not the case. See page 39 hereof. Jensen's right to have a secret consideration of the evidence against him, by a judicially constituted body that conducted a fair hearing in a manner that conformed to the requirements of due process, was a right that was denied to him. It is extraordinarily significant that the Supreme Court of Nebraska does not deny any of the facts on which the violations are based, nor does it find that Jensen was not denied due process, during what it terms "the preliminary proceedings".

Furthermore, the Supreme Court ignores the fact that both Committees make and made determinations, and that, upon a finding of no probable cause by the Advisory Committee, a charge stands dismissed.

Furthermore, the blanket reception by the Referee, over objections, of the void proceedings before the Committee on Inquiry, we submit makes void the entire proceedings of the Referee, of which they are a part, and makes void also the decision of the Nebraska Supreme Court, which is largely based upon such void proceedings.

We can find no reported case that holds that a proceedings remains valid where it is based upon evidence taken in a void proceedings. The guarantees of due process are meaningless if its requirements can be circumvented by the simple plan of receiving in a new hearing all of the testimony taken improperly at a proceeding where due process rights are denied and without regard to any rules of evidence, and hold that the simple expedient of receiving it at a new hearing automatically purifies the contaminated evidence, and removes all necessity for conforming to the guarantees of the Constitution.

B.

Another conflict between the decision below and decisions of this Court is this: This Supreme Court has held in *Tumy v. Ohio*, 273 U. S. 510, 523, 71 L. Ed. 749, 754, 47 S. Ct. 437, 50 A. L. R. 1243, that officers acting in a judicial or quasi judicial capacity are disqualified by their interest in the controversy to be decided. See also *In Re: Murchison* (1955), 349 U. S. 133, 136, 99 L. Ed. 942, 946, 75 S. Ct. 623.

The decision by the Nebraska Court here, which holds that members of the Committee on Inquiry do not need to be unbiased, impartial or disinterested, is clearly erroneous.

Point V.

This Court has recently granted certiorari in at least three cases where questions similar to the present ones have been raised.

See *Koenigsberg v. State Bar* (1957), 353 U. S. 252, 1 L. Ed. 2d 810, 71 S. Ct. 722.

Schware v. Bd. of Bar Examiners, (1957), 353 U. S. 232, 1 L. Ed 2d 796, 77 S. Ct. 752.

Cohen v. Hurley, No. 84, Oct. Term, 1960.

The first two cases above cited dealt with rights of attorneys seeking admission to the bar. The third case deals with the rights of an attorney against whom disciplinary proceedings had been brought. All cases dealt with the guaranteed due process rights of citizens under such circumstances.

Similarly, here are raised serious questions of due process relating to the disciplining of an attorney. For a list of such questions reference is made to "Questions Presented for Review". See page 2 hereof.

Point VI.

This Court's decisions indicate that it should grant a review of this case to determine whether denial of the right to examine evidence, including statements of witnesses, against a person in a disciplinary proceeding, violates due process of law, regardless of whether such denial occurs (a) in a judicial proceeding before a charging body, or (b) in a proceeding before a court appointed referee.

This court has at least twice granted certiorari to review denials of right to examine such evidence in administrative proceedings. *Bailey v. Richardson*, 182 F. 2d 46, 339 U. S. 977, 94 L. Ed. 1382, 70 S. Ct. 1025, 71 S. Ct. 36, 341 U. S. 918, 95 L. Ed. 1352, 71 S. Ct. 669, and *Peters v. Hobby*, 349 U. S. 331, 351, 99 L. Ed. 1129, 1144, 75 S. Ct. 790. In both of those cases, National Security was involved. None is involved here. See also *Aquino v. Knox*, (1948), 60 Atl. 2d 237, 240, and *Ohio Bell Telephone v. Public Utilities Comm.*, 301 U. S. 292, 300, 81 L. Ed. 1093, 1099, 57 S. Ct. 724.

This Court has also held that in both civil and criminal proceedings, a party is entitled to know the evidence being relied upon against him by the Court. *Jencks v. U. S.*, 353 U. S. 657, 666, 1 L. Ed. 2d 1103, 1110, 77 S. Ct. 1007 and *U. S. v. Reynolds*, 345 U. S. 1, 97 L. Ed. 727, 73 S. Ct. 528, 32 A. L. R. 2d 382. See also *U. S. v. Jackson*, (1957), 153 Fed. 2d 781 and *Jordan v. American Eagle Fire Ins. Co.*, (1940), 169 Fed. 2d 281, 288, citing many United States Supreme Court cases.

Jensen made demand for production of documents which were relied upon by Inquiry Committee, and probably by the other bodies involved, which found him guilty. He was refused the right to inspect such documents. Jensen took every legal step available to him to secure documents admittedly in the possession of Connors, the officer appointed to investigate Jensen for the State, and to secure information and statements of persons to be witnesses against Jensen, and which were in the possession of said Connors. Jensen was forced to trial by the Committee on Inquiry and by the Advisory Committee, and by the Referee, and by the Supreme Court without such evidence. Jensen's due process rights under the constitution were violated.

Point VII.

The decision below conflicts in several ways with recent decisions of other State Supreme Courts.

A.

The evidence establishes, and the Nebraska Supreme Court does not find otherwise, that members of the Committee on Inquiry were interested in the outcome of this matter. The Nebraska Supreme Court made no reference to this, but approved action taken against Jensen by the

Committee on Inquiry where several members of such body were interested in the outcome of the proceeding.

In *Petition of Dade County Bar Association*, (1959, Fla.), 116 So. 2d 1, it was stated at syllabus No. 5:

> "If any member of committee appointed by circuit judge to *conduct investigation* of alleged unethical practices by officers of court was interested in cases being investigated, such member would have to excuse himself from participating." (Italics supplied).

In *In Re: Heirich*, (1956), 10 Ill. 2d 357, 140 N. E. 2d 825, 838, 67 A. L. R. 2d 827, cert. den. 255 U. S. 805, 2 L. Ed. 2d 49, 78 S. Ct. 22, which was a disciplinary proceeding, the Court said:

> "It is a classical principle of jurisprudence, that no man who has a personal interest in the subject matter of decision in a case may sit in judgment on that case. The principle is as applicable to administrative agents, commissioners, referees, masters in chancery, and other arbiters of questions of law or fact, not holding judicial office as it is to those who are technically judges in the full sense of the word."

The position of the Nebraska Court, in substance, is in direct conflict with the principle of the above decisions of Florida and Illinois and it appears impossible to reconcile the Nebraska decision with the principles of due process set forth, not only in the Florida and Illinois cases above cited but also principles of due process stated in the *Tumy* and *Murchison* cases, cited on page 36 hereof.

B.

The Nebraska Supreme Court held that "preliminary proceedings before the Committee on Inquiry were merely investigating proceedings which never end in any decree

or establish any right." In support, the Nebraska Court quoted with approval from two Missouri cases; one was *In Re Conner*, 357 Mo. 270, 207 S. W. 2d 492; the other was *In Re Sparrow*, 338 Mo. 203, 90 S. W. 2d 401, 404, from which the Court quoted, in part, as follows:

> "It is plain also that the summary investigations and hearings provided for do not invade or impair any constitutional right of the person whose professional conduct is subject to the preliminary inquiry."

We submit that those cases, in fact, are not authority justifying or supporting the Nebraska decision. As the *Sparrow* case pointed out at syllabus No. 2:

> "Attorney held not denied due process in disbarment proceedings *if accorded fair trial in court according to applicable modes of proceeding.*" (Italics supplied.)

Jensen was *not "accorded fair trial in court* according to applicable modes of proceeding."

However, the Missouri disciplinary procedure, thus approved by the Nebraska Court, was in part strongly condemned as violative of due process rights in *In Re: Noell*, 93 F. 2d 25.

It will be noted that the effect of the Nebraska holding is that the preliminary proceeding is not a judicial proceeding and ends in no decree or establishes no right. This holding is not supported by any State that we know of except Nebraska itself and possibly Missouri and is contrary to the holdings in the following jurisdictions:

In *Toft v. Ketchum* (1955), 18 N. J. 280, 113 A. 2d 671, 674, 52 A. L. R. 2d 1208, Cert. denied, 350 U. S. 887, 100 L. Ed. 782, 76 S. Ct. 141, it is said:

> "From the very beginning a disciplinary proceeding is judicial in nature, initiated by filing a complaint with an ethics and grievance committee."

In *In Re: the Integration Rule of the Florida Bar*, (1956), 103 So. 2d 873, it is stated:

> "Investigation and trial of lawyers for unprofessional conduct must be a judicial proceeding in manner provided by law or supreme court rule."

See also, *In Re Crum*, (1922 Ore.), 204 Pac. 948, 950; *In Re: Melin*, (1951 Ill.), 102 N. E. 2d 119, 121; *Doe v. Rosenberry*, D. C. N. Y., 152 Fed. Supp. 403, 406; *Laughlin v. Clephane*, 77 Fed. Supp. 103, 105. See also the cases cited on page 30 hereof.

Nebraska has here given its approval to judicial investigations which violate the rights of the person investigated. In *William v. U. S.*, 341 U. S. 97, 101, 95 L. Ed. 774, 779, 71 S. Ct. 576, 579, this Court held that a person has a right "to be tried by a legally constituted court, not by a kangaroo court." We submit an attorney also is a person who has the right to have a judicial body, bound by judicial rules, and not a kangaroo body, examine into his conduct and make the determination as to whether the charges against him should be dismissed, or whether they show probable cause to believe him guilty, and make a determination as to whether the charges against him continue to remain secret or whether they shall be made public by the filing of public charges of misconduct against an attorney. Certainly under the Nebraska rules, an attorney has the absolute right to have charges of misconduct against him kept secret unless and until a proper and lawful judicial body, following the court rules that regulate it, and in a proceeding that guarantees due process, determines that there is probable cause to believe

there is guilt. There has never been such a determination here.

Point VIII:

When investigatory or charging disciplinary committees make binding judicial determinations which directly affect the legal rights of attorneys, such committees must use procedures which conform to Constitutional due process guarantees.

The rule stated in the caption to this section was generally enunciated by Chief Justice Warren in his opinion, *Hannah v. Larch*, 363 U. S. 420, 451, 4 L. Ed. 1307, 1326, 80 S. Ct. 1502, as applicable to all governmental agencies. So far as we can determine, that rule has never been passed upon by the United States Supreme Court in relation to investigatory and charging disciplinary committees which must make determinations of probable cause or the lack of it and have authority to dismiss charges or make them public. The Nebraska Court below holds that a disciplinary committee is solely a preliminary and investigating body and is not bound by Justice Warren's decision, although the Nebraska rules (see Appendix No. 1) require compliance with express regulations which were not followed here.

We believe that under the Nebraska disciplinary procedures and the similar procedures in a majority of our States, the investigatory and charging bodies make binding judicial determinations affecting legal rights of lawyers. In considering whether a determination affecting legal rights was made by the Advisory Committee we refer to paragraph 8 of Article XI, page 50 hereof, which, in part, provides: "If the Advisory Committee *determines* that no probable cause for disciplinary action exists * * *

the matter shall stand *dismissed* * * * unless otherwise directed by the Supreme Court." An analogy to a trial court is pertinent and applicable. The order of a trial court is everywhere deemed a final order even though it may be reversed upon appeal to a higher court. So also are the determinations of these Committees final orders, although they may be reversed by a higher judicial body upon automatic appeal to such a body. A dismissal is a final adjudication and determination on the merits and affects legal rights of the parties and is such a final order of finding or adjudication that it is appealable. See 2 Am. Jur. 897, Par. 80, Note 6, citing *United States v. Robertson*, 265 U. S. 168, 68 L. Ed. 962, 44 S. Ct. 508 and *Wilson v. Republic*, 257 U. S. 92, 66 L. Ed. 144, 42 S. Ct. 35.

The Committee on Inquiry served on Jensen charges alleging professional misconduct. It held hearing on its charges. The Committee was required to determine whether or not there was "reasonable ground" to believe there was misconduct on the part of Jensen. Such a judicial determination was made and, after submission to Advisory Committee, its determination was executed by public filing of sworn charges against Jensen.

Similarly, the Advisory Committee was charged with determining whether or not there was "probable cause" to believe Jensen was guilty of misconduct. If the determination was in the negative the charges stood dismissed. If the determination was in the affirmative, publication of the charges and removal of the blanket of secrecy followed.

Whether Jensen was guilty or innocent, his professional reputation was instantly and irreparably damaged by the public filing of such charges. See *Petition of Dade County Bar Assn.* (Fla. 1959), 116 So. 2d 1.

The Committees prepared judicial charges, held judicial hearings, made judicial findings, executed a judicial sentence by the filing and publication of such charges and the removal of the secrecy bars, all in an adversary proceeding.

Jensen's legal right, reputation and property rights were at stake and were directly affected by the adjudications of the Committees.

This Court has consistently held that government agencies which make determinations in the nature of adjudications affecting legal rights are bound to conduct their proceedings to comport with the requirements of due process. This rule is further supported by the following cases:

Morgan v. U. S., 1958, 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, 999.

Greene v. McElroy, 360 U. S. 474, 3 L. Ed. 2d 1377, 79 S. Ct. 1400.

In Re: Grogan, 252 U. S. 330, 1 L. Ed. 2d 376, 77 S. Ct. 510, 59 A. L. R. 2d 940.

Anonymous v. Baker, 360 U. S. 287, 3 L. Ed. 2d 1234, 79 S. Ct. 1157.

Joint Anti Facist v. McGrath, 341 U. S. 123, 95 L. Ed. 817, 71 S. Ct. 624.

Point IX.

The findings of the Nebraska Court, if sustained here, would make the practice of law a hazardous one for attorneys in every state of the Union and especially so in the 34 States which have procedures similar to Nebraska.

Though petitioner stands alone here, the question involved here vitally affects the professional life of many thousands of lawyers throughout this country. At least

thirty-four states have disciplinary procedures similar to Nebraska. See Brand, "Bar Associations, Attorneys and Judges," 1956. The principle established by the judgment of the Nebraska Court is that no attorney, in an affected jurisdiction, has any protected rights as to the investigation of his professional status, or as to the proceedings which result in his being charged and result in public complaints being filed against him, or in proceedings which may result in the dismissal of charges against him, and such proceedings may be conducted without compliance with, and in violation of, the established court rules, and without any protection to the attorney involved of his constitutional rights and guarantees.

CONCLUSION

The all inclusive mantle of protection afforded by due process of law should shield the practicing lawyer, unjustly accused and wrongfully convicted on no evidence of guilt, to the same degree and effect as it afforded protection to a "Schware", a "Thompson" and a "Koenigsberg."

This Court should grant certiorari and the judgment below should be reversed.

Respectfully submitted,

JOSEPH T. VOTAVA, Attorney
Service Life Insurance Building
Omaha, Nebraska
CHARLES B. PAINE, Attorney
108 No. Locust
Grand Island, Nebraska
BAYARD H. PAINE, JR., Attorney
108 No. Locust
Grand Island, Nebraska

APPENDIX 1

ARTICLE XI

OF RULES OF STATE BAR ASSOCIATION

INVESTIGATION AND DISPOSITION OF CHARGES:

1. District Committee on Inquiry; Membership; Term. The Supreme Court shall appoint a Committee on Inquiry in each district court judicial district, of not fewer than three (3) members, and two alternates, who shall serve for such term as shall be designated. One member shall be designated as Chairman, and one as Vice-Chairman to serve as Chairman in the event of the disqualification or unavailability of the Chairman. Where the Chairman determines that a regular member is disqualified or unavailable, he shall select an alternate to serve.

2. ADVISORY COMMITTEE: MEMBERSHIP: TERM. The Supreme Court shall appoint a committee to be known as the Advisory Committee, which shall consist of one member from each Supreme Court Judicial District and a Chairman at large. The members of such committee shall serve for such term as shall be designated.

3. INITIATION OF CHARGES. (a) All charges of unprofessional conduct on the part of any member of the Association shall be first made to the Committee on Inquiry in the district where such member resides, or to the Secretary-Treasurer of the Association or the Clerk of the Supreme Court who shall forward them to the proper Committee on Inquiry; but in all cases where such Committee has information of conduct appearing to be unprofessional it shall forthwith undertake the investigation provided for in Section 5 of this Article even though charges have not been filed with the committee. (b)

Where the initial charges are lodged with a Committee on Inquiry, such committee shall forthwith advise the Secretary-Treasurer of such fact.

4. COMMITTEE ON INQUIRY: DISQUALIFICATION OF MEMBERS: POWERS OF ADVISORY COMMITTEE. (a) In the event that the Chairman is unable to assemble a full Committee because of unavailability or disqualification of regular members and alternates or where a majority of the members of the Committee, for reasons stated request it, the Chairman shall forthwith report the matter to the Advisory Committee for disposition and such Committee shall have power to (1) direct that the members of said Committee on Inquiry who are not disqualified shall proceed and determine such matter, and in that connection, the Advisory Committee may review and disallow claims of disqualification by members and alternates of Committees on Inquiry; or, (2) direct that the matter shall be referred to some other Committee on Inquiry in which case the Committee on Inquiry to which it is so referred shall have full power and jurisdiction to the same extent and in like manner as if said matter had arisen in its district and had been originally lodged with it; or, (3) take jurisdiction of and determine said matter to the same extent and with like power as the original Committee on Inquiry might have done if no disqualifications existed as to any of the members thereof, or (4) direct the appointment of an investigator, who shall submit his report, as directed by the Advisory Committee, either to a Committee on Inquiry or to the Advisory Committee, after which such Committee shall proceed with appropriate disposition of the charges.

(b) The investigator referred to in subdivision (4) above shall be selected by the Secretary-Treasurer, with

approval of the President. Investigators shall be paid their expenses and such per diem as may be approved by the President.

(c) When charges are lodged with a Committee on Inquiry, or with the Advisory Committee, the Committee concerned shall report progress on handling of the charges to the Secretary-Treasurer on the last day of the first full calendar month elapsing after receiving the charges, and each month thereafter, and shall similarly report final disposition of the charges. If such report is not received by the fifth day of the month, the Secretary-Treasurer shall request that the report be forwarded forthwith, and if it it is not received within 10 days thereafter, he shall report such fact to the Court. At the direction of the President, the Secretary-Treasurer shall similarly advise the Court if the reports received by him indicate unreasonable delay at any stage in the handling of disciplinary proceedings.

5. COMMITTEE ON INQUIRY: INFORMAL INVESTIGATION. It shall be the duty of the Committee on Inquiry, upon having information of or upon receiving charges of unprofessional conduct on the part of a member, to make informal and private investigation of the matter; and upon being satisfied that any such information is without foundation or that such charges are without merit, the committee shall take no further action except to dismiss the charges; but if it is not so satisfied, the Committee on Inquiry shall forthwith advise the Secretary-Treasurer of such fact and may, if it deems it advisable, request the appointment of an Investigator. If the President approves the request for an Investigator one shall be selected and paid in accordance with the provisions of Section 4 (b) of this Article.

6. ADVISORY COMMITTEE: INFORMAL INVESTIGATION. In case the Committee on Inquiry shall determine that there is no reasonable ground to believe the members charged guilty of an offense which justifies disciplinary action, the person or persons making the initial charges may lodge with the Clerk of the Supreme Court an informal charge supported by affidavits or other prima facie evidence. The Clerk of the Supreme Court shall thereupon obtain from the Committee on Inquiry the written charges, statements, answer, affidavits or documents filed with it and a report of the said Committee on Inquiry, and shall refer all of such documents to the Advisory Committee for review and recommendation.

7. COMMITTEE ON INQUIRY; FORMAL CHARGES: HEARINGS; POWERS; REPORT.

(a) If, however, a Committee on Inquiry, after making said informal and private investigation, concludes that there is reasonable ground to believe that the member against whom the charges are made is guilty of an offense which may require and justify disciplinary action, said committee shall immediately reduce or cause the charges to be reduced to writing, in the form of a simple, unsworn statement, specifying with particularity the facts which constitute the basis thereof, and shall serve a copy of said written charges upon said member; and the committee shall hold a hearing upon twenty (20) days notice to the said member and the person making the charges, at which hearing the parties may be heard and may file with the committee any statement, answer, affidavit or document and produce other evidence. At all such hearings, the Investigator, if one be appointed in the case, shall, at the request of the Committee conduct the examination of the witnesses and introduction of evidence for the Committee. Notice of the time and place of hearing

shall be given to the parties by registered mail addressed to their last known residence or place of business. The Committee or the Chairman thereof may continue and adjourn hearing and proceedings from time to time and in case where such orders of continuance or adjournment are made, the committee or Chairman shall give notice thereof to the party making the charges and respondents by registered mail or personal notice unless such parties were present in person or by counsel when such order of continuance or adjournment was announced.

(b) If the Committee on Inquiry finds that there is reasonable ground to believe the said member guilty of the misconduct charged, it shall thereupon transmit to the Clerk of the Supreme Court, the Committee's report of investigation, a transcript containing the Charges, and any statement, answer, affidavits or documents submitted and filed, and shall accompany the same with a complaint prepared, verified by any member or members of the committee, and ready for filing in the Supreme Court. The Complaint shall be made in the name of the State on the relation of the Nebraska State Bar Association.

8. ADVISORY COMMITTEE: REVIEW OF RECORD: REPORT. The Clerk of the Supreme Court shall thereupon refer the entire record including the report of the Committee on Inquiry, the transcript and the complaint to the Advisory Committee for review. The Advisory Committee shall have authority to hold further hearing at which the person or persons making the initial charges and the member charged shall have a right to be heard: but the Advisory Committee may direct disposition of the charges and complaint without further hearing. If the Advisory Committee determines that no probable cause for disciplinary action exists, it shall so report to the Clerk of

the Supreme Court and the matter shall stand dismissed unless otherwise directed by the Supreme Court. If the Advisory Committee determines that probable cause for disciplinary action exists, it shall transmit its report, the report of the Committee on Inquiry, together with such amendments thereto as to it may seem proper, to the Clerk of the Supreme Court who shall forthwith enter the same upon the docket of the Court as an orignal action.

9. COMMITTEE - POWER OF SUBPOENA AND TO ADMINISTER OATHS. Committees on Inquiry and the Advisory Committee, within their respective jurisdictions are empowered to issue writs of subpoena, including subpoena duces tecum, in the name of the State of Nebraska, requiring the attendance and testimony of witnesses and parties and the production of records, books and papers at hearings before said Committee; to administer oaths to parties and witnesses and to take their sworn testimony or their unsworn statements as the Committee may decide; and to certify to this court, for appropriate action by the Court, any refusal of a party or witness to comply with the requirements of a subpoena or to testify or answer questions at a hearing.

10. Unless requested by the member charged, neither the hearings, records or proceedings of the Committee on Inquiry or of the Advisory Committee shall be made public, nor shall any publicity be given thereto prior to the filing of a complaint in the office of the Clerk of the Supreme Court.

11. No complaint in any case shall be filed with the Supreme Court until charges shall have first been presented to the Committee on Inquiry and considered by the Advisory Committee as herein provided.

12. Upon the filing in the Supreme Court of a complaint for disciplinary action as contemplated and provided by this Article against a member of the Association, the Supreme Court in its discretion may either designate the Attorney General or appoint any attorney of the Court to prosecute the action. The Attorney General or attorney so appointed may in his discretion prepare and file an amended or new complaint, and in case he has in his possession evidence which in his opinion warrants disciplinary action on any additional charge or charges, he may incorporate such additional charge or charges in the complaint and prosecute same regardless of the fact that such new charge or charges have not been presented to the Committee on Inquiry or considered by the Advisory Committee.

13. Actual expenses incurred by the District or Advisory Committees in connection with hearings prior to the filing of a complaint in the Supreme Court shall be borne by the Association.

14. In addition to the duties heretofore imposed upon the Advisory Committee, the said Committee shall confer and advise with the Committee on Inquiry, and shall promulgate uniform rules of practice and procedure for the hearings and disposition of charges before such Committee. The Advisory Committee is further empowered in its discretion at the request of any member of the association, to express its advisory opinion or give its interpretation upon rules of professional conduct where such question has not been previously determined and is not pending in any proceeding for a determination thereof.

15. The provisions of this Article shall be cumulative and not exclusive.

APPENDIX 2

REVISED RULES OF SUPREME COURT OF STATE OF NEBRASKA

The Revised Rules of the Supreme Court of the State of Nebraska applicable to this proceedings with reference to preparation of briefs, provides for the following:

1) With reference to the briefs in connection with the original proceedings in the Supreme Court of the State of Nebraska, in connection with disciplinary matters, paragraph 9 states:

"If the exceptions be filed to the findings or reports of the referee, printed briefs and argument shall be filed and oral argument in the Supreme Court as required by the rules of this court in civil cases."

2) The rules of the Supreme Court with reference to Civil cases, in connection with the preparation of briefs, requires that briefs include:

(a) The statement of questions involved, which briefly and precisely set forth the principal question or questions to be decided.

(b) Assignments of Error relied upon for reversal and intended to be urged in the brief shall be separately numbered and paragraphed, bearing in mind that consideration of the cause will be limited to errors assigned and discussed.

(c) The argument shall present each question separately. In connection with each question discussed, such propositions of law shall be presented as will best set forth the contentions of the party. Authorities relied upon shall be quoted or otherwise discussed.

(d) With reference to briefs on rehearing the rules provide:

"The brief shall contain the following matters in the Order herein set forth: * * *

(2) Motion for rehearing;
(3) Statement of questions involved;
(4) Propositions of law; and
(5) Argument.

APPENDIX 3

REPORT OF REFEREE

IN THE SUPREME COURT OF NEBRASKA
NO. 34487

STATE OF NEBRASKA, ex rel.)
NEBRASKA STATE BAR ASSOCIATION,)
Complainant.)
vs.)
JOHN P. JENSEN,)
Respondent.)

REPORT OF REFEREE

The undersigned Leslie H. Noble, Referee, heretofore appointed in the above entitled action to take evidence and report his findings of fact and conclusions of law to the Supreme Court of Nebraska, reports as follows:

This is a disciplinary proceeding involving John P. Jensen, respondent, a practicing lawyer, residing at Kearney, Buffalo County, Nebraska, who is a member of the Nebraska State Bar Association. He and Kenneth Dryden have been law partners since 1932.

The complaint against him was filed in this Court by the Committee on Inquiry of the Nebraska State Bar Association for the Twelfth Judicial District. It contains five counts charging unprofessional conduct and violation of the Canons of Professional Ethics by respondent. Complaint was brought in the name of State of Nebraska, ex rel. Nebraska State Bar Association.

Court One will be referred to as the Vielehr matter and alleges in substance:

That on April 21, 1953, Dryden, Jensen and Dier represented Loretta Malone Viehler, plaintiff, against her brother, Cecil F. Malone, defendant, in an action in District Court of Kearney County, Nebraska. The suit involved title of real property in Minden, Nebraska. Respondent appeared for plaintiff and was present in Court on April 21, when she testified. That she testified to a set of facts in substance relating to her age, birth place in Minden, Nebraska, which was the residence of her parents, her personal residence and schooling in Nebraska and that Cecil F. Malone was her brother. That respondent had verified plaintiff's petition which alleged plaintiff and defendant were the only children of Mary Jane Malone, who died at her home in Kearney, Nebraska, on July 29, 1948.

Count one further alleged in substance that during this same time, Dryden and Jensen were representing the Estate of Ralph M. Barney, Deceased, in the County Court of Buffalo County, Nebraska. That one Mary Elizabeth Barney Ronnebaum filed a claim against this estate alleging decedent, Ralph M. Barney, was her father and Loretta Malone Vielehr was her mother. A deposition of Lucille Vielehr was taken before a Notary Public in Omaha on January 21, 1954. That respondent and his law

partner appeared on behalf of the Barney estate. That Ed (Edward J.) Baburek and Mr. Boone appeared on behalf of claimant, Mrs. Ronnebaum. That in that deposition, in her examination by Baburek, Lucille Vielehr testified to an entirely different set of facts than she had in Vielehr vs. Malone, supra, which were in substance that her birth place and residence were in California; subsequent residence with her parents was in Cleveland, Ohio, and in Chicago, Illinois; and her school attendance in those two cities; no residence in Nebraska; death of her mother in Cleveland; that she had no brothers and sisters and owned no property in Nebraska.

Count one further alleged respondent was present during taking of aforesaid deposition and respondent went over the testimony with witness Vielehr the night before deposition was taken. This deposition was made an exhibit by respondent and introduced in evidence by him in a hearing in the Ralph M. Barney estate and such testimony involved a material issue in that estate. That such testimony was false and at variance with testimony given by Mrs. Vielehr in Vielehr v. Malone, supra, which respondent well knew.

Count one further alleged that Loretta Malone Vielehr, plaintiff, in Vielehr v. Malone, and who testified in District Court of Kearney County, Nebraska, on April 21, 1953, was same person as Lucille Vielehr, who gave the Omaha deposition.

Count Two will be referred to as the Molzen matter and contains the following allegations:

That on March 22, 1951, the respondent was attorney for plaintiff in a divorce action in the District Court of

Buffalo County, Nebraska, Case No. 16474, by Hazel M. Molzen against Cecil W. Molzen. A property settlement was filed in said case and a decree was entered and filed on July 31, 1951; that included in said decree was a proviso as follows: "* * * that plaintiff's attorney is given a lien on amounts due and owing from defendant to plaintiff in the amount of 15%." That said property settlement provided that each of the parties would pay his own attorney's fees and that there was no request for such proviso in the pleadings of the case. That after the decree was entered, an attorney's lien was filed in this case on July 31, 1953. That on January 2, 1954, the District Court, on motion of said plaintiff and over objections filed by the said respondent, struck said proviso from the decree entered in the case.

Count Three will be referred to as the Evans matter. It does not lend itself to condensation. This count alleges: That the said John P. Jensen on January 22, 1951, drew a last will and testament for one Lydia F. Evans wherein the said respondent was nominated and appointed executor of said will; that on February 8, 1951, the said respondent drew a codicil to said will for said testatrix, Lydia F. Evans. That said respondent with the permission of said testatrix retained the will in his office. That sometime thereafter, the said Lydia F. Evans decided she wanted to destroy the said will and leave all her property to her children, and repeated attempts were made by the said Lydia F. Evans to get her last will and testament from the said respondent, but the said respondent refused to give said will to her. That thereafter on September 14, 1951, the said Lydia F. Evans, together with her son, Franklin F. Evans, went to the office of said respondent and again demanded the last will and testament of the

said Lydia F. Evans. That the said respondent again refused to give Lydia F. Evans the will. At this time Mr. M. H. Worlock, an attorney, who had previously been consulted by the said Lydia F. Evans, was called and came to the office of the said respondent; that the said M. H. Worlock asked the respondent why he wouldn't give Mrs. Evans her will, but the respondent refused to return the will because he said he had the rights of other people to protect, and if he gave her the will, she would destroy it. That the said respondent in this connection was attorney for the said Lydia F. Evans without any obligation to protect the rights of any other person or persons. The said Lydia F. Evans was under no disability at that time and had the right to receive possession of said will and the right to intentionally destroy, alter or revoke her said will and the codicil thereto. That said Lydia F. Evans on September 15, 1951, duly executed a revocation of said will and the codicil thereto. That on June 25, 1954, the said Lydia F. Evans died leaving an estate consisting of real and personal property appraised at $117,686.21. That said respondent on July 31, 1954, filed the said will and codicil which he had wrongfully retained in his possession together with a petition seeking probate of said will and codicil in the County Court of Buffalo County. That said Court adjudged that the will and codicil had been executed as required by law at a time when the said testatrix had testamentary capacity, but that likewise while having testamentary capacity and without undue influence, she had duly executed a revocation thereof and died intestate. That the said John P. Jensen and one Maurice F. May, a nephew of said testatrix, appealed to the District Court of Buffalo County, wherein said respondent and the said Maurice F. May filed a petition seeking a probate of the purported will and codicil. The contestants filed an answer denying generally and alleging a subsequent revo-

cation thereof, and proponents replied denying generally and alleging the revocation was executed by said testatrix by reason of improper and undue influence exerted upon the mind of said testatrix by the said Franklin F. Evans and that the testatrix lacked testamentary capacity. Said cause was tried to a jury and a verdict was returned finding that the revocation was a true and valid revocation of the testatrix and judgment was rendered in conformity therewith. That said respondent and the said Maurice F. May on April 6, 1956, perfected an appeal to the Supreme Court of Nebraska and on December 28, 1956, a decision was rendered by that Court.

Count Four will be referred to as the Bentley matter. It contains the following allegations:

That on September 14, 1953, the said John P. Jensen was attorney for William Bentley in the matter of the guardianship in the County Court of Buffalo County, wherein William Bentley had petitioned that Lillian Bentley, his mother, be placed under guardianship, that the petition for the guardianship had been filed in the spring of 1953 and at all times during said action, the said Lillian Bentley was represented by one Ward W. Minor, an attorney at Kearney, Nebraska. The said respondent, knowing that Lillian Bentley was represented by counsel and without the approval of her counsel, together with David H. Drage, Deputy Sheriff for Buffalo County, William Bentley and his secretary, Josephine Wetovick, went to the home of Lillian Bentley to get a statement from her. The said respondent told Mr. Drage that he had called Mr. Minor and had received permission to take such a statement, when in fact, respondent had not called Mr. Minor and had not received permission to take a statement. Further, the said respondent, without the consent

or invitation of Lillian Bentley or her attorney and without any authority and against the expressed desire of Bert Bentley, the husband of said Lillian Bentley, entered the Bentley home for the purpose of taking the statement of said Lillian Bentley.

Count Five will be referred to as the Blue matter and contains the following allegations:

That on or about April 22, 1956, the said John P. Jensen wrote a letter to the Kearney State Teachers College. In said letter the respondent purported to represent one Chester A. Blue on a workmen's compensation claim against said college; when in fact the said respondent tried to talk said Chester A. Blue into making a claim against said college but the said Chester A. Blue expressly refused to do so and did not authorize the said respondent to write such a letter nor to represent him in any claim against said Kearney State Teachers College.

All five counts above separately allege the informal and private investigation of these various charges by Committee on Inquiry of the Twelfth Judicial District, fixing of time and place of hearing of complaint charged and notice of same to respondent, finding of reasonable grounds to believe respondent guilty of the misconduct charged, preparation of this complaint and transmittal of same, transcript containing charges and all papers and documents to Clerk of Supreme Court for filing in this Court.

The prayer of the complaint is that this Court take such disciplinary action as it deems just and proper.

Respondent filed a lengthy answer, specifically denying he has been guilty of any unprofessional conduct, or that he has violated any of the Canons of Ethics of the Ne-

braska State Bar Association or governing Nebraska practicing lawyers. His answer pleads by way of defense:

(1) Laches to all counts except count five, the Blue matter, alleging that witnesses who had knowledge of the facts have died, moved away and disappeared before notice of charges were served upon respondent.

(2) Lack of due process of law in that (a) two members of the Committee on Inquiry were prejudiced, unfair and partial and (b) the Committee's proceedings were irregular.

(3) A general denial of all material allegations of the complaint.

Respondent's answer admits to count one, the Vielehr matter, his lengthy conference of approximately three hours with Loretta Malone Vielehr, also known as Lucille Malone Vielehr, held the night before Mrs. Vielehr's deposition was taken; that part of their discussion was about the claim of Mrs. Ronnebaum filed in the Barney estate; that Mrs. Vielehr told respondent she would die before she revealed to claimant Ronnebaum where she, Mrs. Vielehr, was born, or raised or where her parents had lived or her relatives now lived. His answer admits subparagraph 12, paragraph V, that part of Mrs. Vielehr's testimony in her Omaha deposition was not true. His answer admits subparagraph 14, paragraph V, that a copy of Mrs. Vielehr's deposition was procured and filed by respondent for use in estate of Ralph M. Barney, deceased, the respondent anticipating a hotly contested suit on Mrs. Ronnebaum's claim.

Respondent's answer admits to count two, the Molzen matter, that he prepared the decree of divorce and it contained a clause for 15% attorney's lien based on the amount

of alimony settlement his client obtained from her defendant husband. That on January 2, 1954, after full hearing, the District Judge found there had been no pleadings or evidence relative to respondent's attorney fees or a lien therefor, that the Court had no jurisdiction to include a provision for a lien in the decree and ordered the 15% lien of respondent stricken from the decree.

Respondent's answer admits to count three, the Evans matter, that Mrs. Lydia F. Evans was a widow and possessed of real and personal property of the value of about $125,000.00 when he drafted her will on January 22, 1951. That on September 14, 1951, Mrs. Lydia F. Evans, Franklin Evans, her son, and M. H. Worlock were in respondent's office, and a demand was made upon him for surrender of Mrs. Evans' will. That he refused to surrender it and respondent retained its custody. That respondent was named executor in the will and filed a petition for its probate after Mrs. Evans' death.

Respondent's answer to count four, the Bentley matter, admits:

1. He represented William Bentley, son of Lillian Bentley, and prepared and filed a petition for William to have a guardian appointed for Mrs. Bentley.

2. That Ward Minor represented Mrs. Bentley, who filed objections to aforesaid petition.

3. That on the evening of September 14, 1953, while the guardianship case was pending, the respondent, Dave Drage, a Deputy Sheriff and Mrs. Josephine Wetovick, respondent's office secretary, drove to the home of Lillian Bentley and Bert Bentley, her husband, at respondent's request.

4. That respondent and the Deputy Sheriff entered the Bentley home.

5. That respondent and the Deputy Sheriff were met in the home by Bert Bentley who strongly protested against respondent talking to Mrs. Bentley.

6. That when the guardianship hearing was held, he moved for dismissal of the proceedings, respondent being satisfied Mrs. Bentley was competent based on her testimony and conduct.

Respondent's answer admits to count five, the Blue matter:

1. Chester A. Blue consulted respondent about March 24, 1956.

2. That at this office conference Blue informed respondent that Mr. Cushing, President Kearney State Teachers College, Blue's employer, told Blue after his accidental injury, that Blue was entitled to compensation under the Workmen's Compensation Act or the Teachers College would pay him his monthly wages. That Blue informed respondent he told President Cushing he would take his monthly wages of $233.33 rather than the workmen's compensation.

Respondent's answer prayed for a dismissal of all charges in the complaint.

The complainant's reply was in the nature of a general denial.

Pursuant to notice and written stipulation of the parties concurred in by the Referee, hearing was held at Kearney, Nebraska, before the referee on April 20, 21, 22.

23 and 24, 1959, upon the issues framed by the pleadings. Complainant appeared by Gerald S. Vitamvas, an Assistant Attorney General of Nebraska. Respondent appeared in person and by his counsel, Charles B. Paine, Joseph T. Votava, Kenneth Dryden and John P. Jensen, pro se. Dryden withdrew as counsel after he had testified as a witness for respondent. Evidence of the parties was introduced and received. A transcript of all evidence was prepared by Court Reporter. The transcript is rather voluminous, consisting of volumes 1 to 17 inclusive. The Bill of Exceptions was settled on September 14, 1959. Thereafter counsel submitted briefs; complainant's reply brief was filed December 26, 1959. A careful study of the entire transcript of the evidence has been made by the referee. The transcript is filed herewith.

Upon consideration of all the evidence introduced and received and the briefs of counsel for the parties, the referee submits the following findings of fact and conclusions of law: The findings of fact are of necessity quite long in order to give details and background involving the respondent's conduct and motives.

FINDINGS OF FACT

Count One - Vielehr Matter

1. The respondent, John P. Jensen, as a member of his law firm, personally represented a client, Loretta Malone Vielehr, in an action in the District Court of Kearney County, Nebraska. Mrs. Vielehr, the plaintiff, had filed an equity action against her brother, Cecil F. Malone, defendant, seeking to impress a trust against certain real estate located in that county. Trial was had on April 21, 1953, and respondent was present and examined Mrs. Vielehr when she testified. She testified (Exhibit 25)

she was then 62 years old and was born in Minden, Kearney County, Nebraska; that she was 22 years old when she left home and went to school in Lincoln, Nebraska; that her father was in the plumbing business in Minden; that she was living in Lincoln in 1926; that she worked in Lincoln until she was transferred to Omaha, Nebraska; that she was transferred to Chicago in 1931; that her father died on October 2, 1926, and she was living in Nebraska at that time; that Minden, Nebraska, was her home; that Cecil Malone was her brother. This equity case was appealed to this Court by respondent on behalf of plaintiff - Vielehr v. Malone, 108 Neb. 436, 63 N. W. 2d 497.

2. While the above case was pending, respondent, as a member of his law firm, was representing Warren Barney, the executor of the estate of Ralph M. Barney, deceased, then being administered upon in the County Court of Buffalo County, Nebraska. Respondent also represented the four heirs at law of the decedent, who were Warren and William Barney, Betty Lanigan and Emma Jane Lisk, the children of the decedent.

3. Mary Elizabeth Barney Ronnebaum filed a petition in the Barney estate claiming Ralph M. Barney, deceased, was her father and that Loretta Malone Vielehr was her mother; that she was the issue of a common law marriage of Barney and Loretta Malone Vielehr in the State of Iowa; that Barney's failure to include her as a beneficiary in his will was unintentional. She prayed for a determination of heirship as his daughter and for a share in his estate.

4. Respondent prepared and filed separate answers for the executor and for the four Barney heirs at law denying Mrs. Ronnebaum's claim of heirship.

5. Edward J. Baburek, an attorney at Omaha, Nebraska, and the law firm of Boone and Boone of Leavenworth, Kansas, represented Mrs. Ronnebaum. Baburek served notice on Loretta Malone Vielehr, a resident of Chicago, Illinois, to take her deposition there. By oral agreement of Dryden and Jensen made with Baburek, Mrs. Vielehr's deposition (Exhibit 28) was taken by Baburek in Omaha instead of Chicago on January 21, 1954, before James M. Johnson, General Notary Public.

6. Loretta Malone Vielehr was the same person as Lucille Vielehr, who testified in this deposition. She was respondent's client in the case of Vielehr v. Malone, supra, then pending in the Supreme Court of Nebraska. In the Omaha deposition, she testified as follows: That she was born in Caloma, California, on August 26, 1901; that she had no brothers or sisters; that she lived with her parents in California until she was six years old; that in 1907, she and her parents moved to Cleveland, Ohio, where she lived with them; that they moved to Chicago, Illinois, where she lived with her parents; that she went to the University of Chicago in 1926 and was then living with her parents; that her father died in Chicago in 1928 and was buried in Cleveland; that her mother died in Chicago in 1948 and was buried in Cleveland; that she went to a Catholic grade school and high school in Cleveland called Miss Loretta Shrivel's Parochial School; that she went to a high school by the name of Mount Holly Academy from which she graduated; that she attended the University of Chicago but did not graduate; that she knew the law firm of Dryden, Jensen and Dier, and that they represented her on a case called Pentuch; that she never lived in Nebraska; that she only used the name, Loretta Malone on her baptism; that she lived in Cleveland, Ohio, with her parents in 1912; that she was 11 years old at the time;

that in 1913, she resided in Cleveland; that she was never in Nebraska in 1912 or 1913; that she did not own real estate in Nebraska. Respondent was present during the taking of Mrs. Vielehr's deposition by Baburek. Respondent went over the testimony of the witness with her for approximately three hours the night before the deposition was taken. Respondent cross-examined Mrs. Vielehr. Respondent knew all the foregoing testimony of Mrs. Vielehr was false. After the deposition was taken, respondent and Dryden talked to Baburek. Baburek testified that respondent made "some remark that she hadn't told all the truth," (Exhibit 31, p. 1944, l. 10 and 11). Baburek knew from his examination of Mrs. Vielehr that she had lied. (Exhibit 31, p. 1944, l. 17). Respondent gave no details of Mrs. Vielehr's false testimony and made no full disclosure of same to Baburek.

7. Respondent, knowing, that Mrs. Vielehr had testified falsely, cross-examined her as follows:

Q. "* * * I went over this matter with you last night approximately three hours, didn't I?"
A. "Yes."

Q. "And isn't it a fact that I told you to testify to the truth to the best of your knowledge?"
A. "Yes, sir." (Exhibit 28, p. 1863, l. 16 to 22)

8. Respondent procured a copy of this deposition (Exhibit 28) containing Mrs. Vielehr's perjured testimony for and on behalf of the executor and heirs at law of the Ralph M. Barney estate and caused the same to be filed in the County Court of Buffalo County on February 16, 1954.

9. Hearing on Mrs. Ronnebaum's claim of heirship in the Barney estate was set for February 17, 1954, at 10:00

o'clock A. M. before County Judge Harvey M. Wilson. Respondent fully anticipated a spirited contest on the issues of Mrs. Ronnebaum's claim and the answers of respondent's clients, the executor and heirs at law of this estate. Respondent filed the answer of the heirs on February 17 —the date of the hearing. Respondent and his partner Dryden appeared for the contested action. Mrs. Ronnebaum and her attorneys did not appear. Judge Wilson required Baburek to be called. Dryden called him long distance and was told Mrs. Ronnebaum, Baburek and associate counsel did not intend to appear and prosecute her claim. Respondent, Dryden and Warren Barney discussed among themselves whether Judge Wilson should be informed the direct examination of Mrs. Vielehr in her Omaha deposition was false. It was decided Dryden should tell the County Judge. It was not until AFTER respondent discovered Mrs. Ronnebaum and her attorneys would not appear that Dryden talked to Judge Wilson about Mrs. Ronnebaum's perjured testimony. Respondent testified before the referee as follows:

Q. "Did you do anything to inform the Judge?"
A. "Oh, yes."

Q. "And then when these attorneys did not come and a default judgment was to be taken, THEN Mr. Dryden went in alone and talked to the Judge, is that correct?"
A. "Yes, he went in alone. As a matter of fact, I think I was talking to somebody out in the anteroom at the time." (Vol. 5, p. 526, l.9 to 15).

10. Respondent conducted the default hearing on determination of heirship before Judge Wilson. He examined Warren Barney, who testified that he, his brother, William, and his sisters, Betty Lanigan and Emma Jane Lisk were the children and sole heirs of Ralph M. Barney, deceased: that Mary Elizabeth Ronnebaum was not a daughter of

the decedent. Respondent offered in evidence only the cross-examination of Mrs. Vielehr's Omaha deposition, which he and Dryden testified before the referee was truthful. He told Judge Wilson not to consider the direct examination of Mrs. Vielehr. Respondent made no statement whatever to Judge Wilson about the perjured testimony of Mrs. Vielehr's direct examination. Respondent did not hear and had no personal knowledge of the nature or extent of Dryden's disclosure to Judge Wilson. Judge Wilson entered an order determining the heirs at law of Ralph M. Barney, deceased, and denied Mrs. Ronnemaum's claim of heirship. Respondent admitted in his testimony before the Advisory Committee that the testimony of Warren Barney, without the deposition of Mrs. Vielehr, would have been sufficient to establish heirship of Ralph M. Barney, deceased, and defeat the claim of Mrs. Ronnebaum. (Exhibit 33, p. 2094, l. 8 to 14).

11. The perjured testimony of Mrs. Vielehr contained material facts tending to disprove the claim of Mrs. Ronnebaum that she was the daughter of Ralph M. Barney and Mrs. Vielehr, and thus not entitled to a share in the Ralph M. Barney estate.

12. Respondent fully intended to introduce the entire deposition of Mrs. Vielehr in the event of a contest on Mrs. Ronnebaum's claim and until he discovered Mrs. Ronnebaum would not prosecute her claim as recited in the following quotation from respondent's brief, page 27: "The Barney estate attorneys would have been derelict in their duties had they not had the testimony of Vielehr transcribed and had it available in Court for the hearing on February 17th."

13. Dryden told Judge Wilson in his private office the

morning of the Barney estate default hearing that Mrs. Vielehr had lied in her deposition but gave no specific detail of it. Neither respondent nor his partner informed Judge Wilson that they were attorneys for Mrs. Vielehr in litigation then pending in the Nebraska Supreme Court. Judge Wilson testified before the referee he had no knowledge Mrs. Vielehr was respondent's client, until the Supreme Court's opinion in Vielehr v. Malone, supra, was released March 26, 1954. (Vol. 6, p. 783, l. 1 to 14).

14. Respondent later represented Mrs. Vielehr as the contestant to the probate of the will of her brother, Cecil F. Malone, in the County Court of Kearney County, Nebraska. Respondent took her deposition (Exhibit 26) in Chicago on February 28, 1955. Mrs. Vielehr, on cross-examination by attorney William Meier, admitted that most of her testimony in her Omaha deposition concerning her place and date of birth, schooling, residence prior to 1931 and her relatives was perjured.

15. This deposition of perjured testimony was procured and filed by respondent, despite his testimony on cross-examination before the referee that he held such evidence in contempt. He testified as follows: "* * * and as far as we (respondent, Dryden and Bareny) were concerned, we felt we didn't want that, we didn't want that kind of evidence around." (Vol. 5 p. 535, l. 1 to 3).

Count Two - Molzen Matter

1. Respondent prepared and filed a petition for Hazel M. Molzen, plaintiff, on March 22, 1951, in the District Court of Buffalo County, Nebraska, praying for an absolute divorce from her husband, Cecil W. Molzen, defendant, and equitable relief. Personal service was obtained upon defendant. An order for temporary support and

suit money of $150.00 was made by the Court on March 31, 1951. Special appearance of defendant by his attorney, Louis A. Holmes, was over-ruled and thereafter on June 2, 1951, defendant filed answer of a general denial to which plaintiff filed a reply. On July 31, 1951, the date set for the divorce hearing, the respondent filed a notice of attorney's lien. (The Clerk's records show filing date was July 31, 1953, but the true and correct date was 1951). On the same date, respondent filed an agreement for property settlement entitled "Agreement in Contemplation of Divorce." This agreement was executed by defendant on June 19, 1951.

2. The aforesaid agreement called for payment of $5,500.00 alimony to be paid plaintiff by defendant as follows: "(a) $3,000.00 upon the execution of the agreement which shall be paid $2,000.00 in cash and $1,000.00 by way of assignment of the sum of $1,000.00 due from the plaintiff's brother, Carl B. Johnston, Jr., to the defendant, *which sum is in the hands of the plaintiff herein.* (b) The payment of $500.00 on December 31, 1951, to the Clerk of District Court of Buffalo County, Nebraska. (c) Payment of $2,000.00 to the Clerk of District Court of Buffalo County, Nebraska, on or before the 31st day of December, 1952."

3. Paragraph V provided that each party pay his own attorney's fees and plaintiff to pay Court costs.

4. Hearing was had on plaintiff's divorce petition before District Judge E. G. Reed on July 31, 1951. Appearances were made by plaintiff and respondent and Louis A. Holmes, attorney for defendant, who made no personal appearance. Plaintiff submitted testimony and defendant offered none. Respondent had prepared a divorce decree

prior to the hearing. It granted plaintiff an absolute divorce from the defendant to become final six months hence. It recited the terms of the aforesaid agreement in contemplation of divorce and approved same. It contained this provision: "That plaintiff's attorney is given a lien on amounts due and owing from defendant to plaintiff in the amount of 15%." Respondent testified he told Mrs. Molzen before divorce hearing was had, he intended to charge her 15% of amount recovered from defendant and he would put this in the decree. (Vol. 5, p. 473, l. 3 to 9) His answer alleges she raised no objection to the fees charged. A substantial part of the alimony was unpaid at the time of divorce hearing.

5. Respondent submitted a copy of the decree to Louis A. Holmes and the plaintiff at the hearing. Respondent, at the same time, gave the original decree to Judge Reed but did not discuss or make known to him respondent's fifteen per cent (15%) attorney fee. Respondent testified that Judge Reed read the decree. Judge Reed signed this decree. Mrs. Molzen did not see the decree and testified she did not know its contents prior to the hearing. Mrs. Molzen did not see the agreement in contemplation of divorce and respondent did not have her execute the same until the date of the divorce hearing although she previously knew its terms.

6. Mrs. Molzen believed from previous statements made by respondent to her prior to the hearing, that he intended to charge her $150.00 in addition to the Court costs which was agreeable with her. Respondent had previously been paid $150.00 by defendant through Louis A. Holmes during negotiations of settlement. Mrs. Molzen had advanced $50.00 to respondent for Court costs. She testified she did not learn until immediately after the divorce hearing.

that respondent intended to charge her 15% of the alimony to be recovered. Respondent knew defendant had paid $1,000.00 alimony to Clerk of District Court and immediately after the divorce hearing, took plaintiff to the Clerk's office where respondent insisted that out of the $1,000.00, the clerk give him $450.00 representing 15% of the $3,000.00 alimony within paragraph (a) of the agreement in contemplation of divorce. Mrs. Molzen strenuously objected for three reasons: (1) That respondent had told her his fees would be $150.00 plus Court costs all previously paid him. (2) That she had not agreed to pay respondent 15% of alimony recovered. (3) That respondent was not entitled to 15% of $1,000.00 payment made directly to her by her brother for a loan he had obtained from Cecil W. Molzen because respondent had performed no legal services in its collection.

7. Johnston, Mrs. Molzen's brother, had paid her $1,000.00 approximately a year before she consulted respondent about her divorce. Paragraph (a) of the property agreement recites she had already received this money.

8. Respondent collected fees of $450.00 from the Clerk on July 31, 1951, over his client's objections. He insisted on and ultimately received total fees of $772.31 in this case. His fee represents 15% ($825.00) of total alimony of $5,500.00 called for in the property agreement, less approximately $50.00, he later agreed to waive when the Clerk of the District Court distributed a balance of $1,760.00 alimony, as hereinafter stated in these findings.

9. Mrs. Molzen wrote respondent a letter dated December 4, 1951, alleging his fees were excessive and terminating his firm's services. On December 31, 1951, Mrs. Molzen, by her attorney, William Meier, filed notice to

the Clerk of the District Court that she had discharged respondent's firm and directed him to not disburse alimony in his possession until further order of the Court. The same date she filed a motion to strike and expunge from her divorce decree matters not within the pleadings of her divorce petition in fixing attorney fees. The motion alleged in substance the plaintiff had no contract for legal services except respondent had assured her his fees would be $150.00, an irregularity in obtaining the divorce decree because respondent had incorporated therein a provision granting him a lien of 15%, which was not contemplated by the pleadings. The motion called for an order to strike the 15% lien from the decree for the reason it was not alleged in the pleadings, was beyond the power of the Court to make and was void.

10. On April 3, 1953, respondent obtained an order for leave to intervene, and on the same date he filed an answer to plaintiff's aforesaid motion, alleging in substance that he and plaintiff had no agreement for attorney fees; that he had advised her no fees could be fixed because he had no knowledge of the amount of work which would be required and that *they would have to wait to agree on his fees until the amount of work involved was determined and amount recovered from the defendant was ascertained;* that there was no irregularity in incorporating the 15% lien for attorney fees in the decree; that plaintiff had consented to the 15% provision prior to entry of the decree and made no objections until after decree was entered; denied Court's jurisdiction to modify the decree and that plaintiff's motion should be denied and respondent should be given judgment from 15% of any amount recovered for plaintiff.

11. Hearing was had upon the pleadings before Dis-

trict Judge Reed on January 22, 1954, with appearances of plaintiff and Meier, her attorney and respondent. Evidence was adduced and arguments submitted. Judge Reed made and entered the following order, and the material part of the findings and order are as follows: "the order for said 15% lien in the original decree was included in a journal entry of said judgment with no evidence having been taken thereon; that no actual agreement existed between the plaintiff and her attorney as to payment of same and no agreement between them was actually made as to fees to be paid for services in the case; that said provision is void and should be stricken * * *."

12. Defendant Cecil F. Molzen subsequently paid the balance of $1,760.00 alimony to the Clerk of the District Court. This amount remained the subject of controversy between respondent and Mrs. Molzen on account of respondent's claim of 15% as his fee and Mrs. Molzen engaged the services of attorney Robert M. Haney to settle the argument. On March 27, 1957, a written stipulation signed by Mrs. Molzen and respondent was filed agreeing that the Clerk distribute $1,560.00 to Mrs. Molzen and $200.00 to respondent's firm on condition their attorney's lien be released and discharged. Mrs. Molzen actually received $4,500.00 alimony from her husband plus $1,000.00 he assigned her which represented a loan he had made to Mrs. Molzen's brother. Mrs. Molzen paid the total Court costs of $135.94.

Count Three - Evans Matter

1. On January 22, 1951, respondent prepared the last will and testament of Mrs. Lydia F. Evans; 17 days later on February 8, 1951, he prepared the codicil to her will. Mrs. Evans was 82 years old, a widow and long time resident of Kearney, Nebraska. She was possessed of a

sound mind and disposing memory and mentally competent to make a will. She remained mentally competent with a clear mind up to the time of her death on June 25, 1954. She had two sons, Franklin F. and Galen G. Evans and a daughter, Martha E. Priebe, all of whom were adults and who constituted her sole and only heirs at law. At the time she executed her will, she was possessed of real estate and personal property in Nebraska of approximate value of $125,000.00. Respondent had represented her in several matters over a period of several years prior to January 22, 1951, and knew the nature, extent and value of her property. Respondent was nominated and appointed executor in her will with the usual powers of administration plus the authority, at his discretion, to sell all or any part of her real estate and personal property, either at public or private sale without the order of any Court. The codicil directed the executor to sell certain real estate and distribute the proceeds to certain beneficiaries, ratifying the will in all other respects. None of her children accompanied her to respondent's office when the will was drafted. Respondent and Samuel M. Forney, her nephew, called for her at her home and took her to respondent's office where the will was drafted and executed. Forney was present at the execution of the will. The will devised him real property in Kearney valued at between $2,000 and $3,000. He was named the sole residuary legatee and devisee in her will. Mrs. Evans' son Galen accompanied her to respondent's office when she executed the codicil, but was not in respondent's office at the time of execution. On January 27th, five days after the will was executed, Mrs. Evans, accompanied by her son, Franklin went to the offices of respondent's firm for the purpose of obtaining her will. About a week later, Mrs. Evans and her son Franklin again went to this law office where she requested her

will. On one of these occasions Mrs. Evans asked the office secretary for her will and was told she had no authority to deliver it and suggested Mrs. Evans wait for one of the members of the firm who were then absent. Mrs. Evans and Franklin waited awhile and then left without her obtaining the will. On the other occasion, above mentioned, Mrs. Evans went into the private office of respondent's partner and requested her will in the presence of Franklin. Respondent's partner directed his stenographer to prepare a copy of the will. After its preparation, he read it and handed it to her. She asked him whether it was the signed copy of her will—that she wanted the signed copy. He told her it was not, that he could not give her the signed copy. She and Franklin left without her will. Respondent was not present at either time.

2. On September 14, 1951, Mrs. Evans, accompanied by her son Franklin, went to respondent Jensen's office. There she asked respondent for her will. Franklin also requested respondent to give his mother her will but respondent refused. After respondent's persistent refusal to deliver Mrs. Evans her will, Franklin called M. H. Worlock, a Kearney lawyer to come to respondent's office. Worlock came shortly afterwards. Worlock said to respondent:

> "John, why don't you give Mrs. Evans her will? She is entitled to it." (Vol. 5, p. 92, l. 24, 25)

Instead of answering Worlock directly, respondent said:

> "Mrs. Evans—or Aunt Lydia, I am not going to give you this will. If I give it to you, you will destroy it; you will not be in a position to make another will, and I have the interests of these parties to protect, and I am not going to give you the will." (Vol. 5, p. 93, l. 1 to 5).

Respondent did not give Mrs. Evans her will and she, Franklin and Worlock left his office. Immediately after this conversation, respondent called Samuel M. Forney, the above named beneficiary, of Mrs. Evans' will. Respondent told Forney Mrs. Evans, Franklin and Worlock had been at his office trying to obtain her will, and he suggested that Forney do whatever he felt it was necessary to protect his interests and of anyone else.

3. Mrs. Evans had consulted attorney Worlock two or three times prior to September 14, 1951, about obtaining her will from the respondent. Worlock had advised her to go to respondent's office and ask him for it.

4. Respondent testified (Vol. 5, p. 485, l. 19, 23) that when Mrs. Evans executed her will on January 22, she gave him this unusual direction:

> "Mr. Jensen, this is, I believe, the last will that I will ever make. You are to keep it; you are never to give it to anybody; if anyone comes up here with me, you are not to give it to me; if I come up alone, you can give it to me."

The above direction, however, is not included in the written record of conversation between respondent and Mrs. Evans which was taken and transcribed by Helen Joyce Psota, respondent's office secretary, at the time the will was executed. Respondent said to Mrs. Evans:

> "You must understand, Mrs. Evans, that I won't give this will to anyone else. If you ever want it, or to get it, you will have to ask for it personally, because you understand lawyers don't let wills out." (Exhibit 4, p. 7, l. 3 to 6)

Respondent told Mrs. Evans, according to this transcription, he would keep her will. She did not suggest it to him.

5. On September 15, the day following respondent's refusal to give Mrs. Evans her will, she went to Worlock's office where she executed a revocation of her will and codicil in respondent's possession. She had made arrangements with Worlock on September 14, immediately after she and Worlock left respondent's office, to execute the aforesaid revocation. Mrs. Evans was mentally competent and had testamentary capacity when she executed the revocation. Numerous times subsequent to September 14, Mrs. Evans told her three children she would like to have respondent give her her will. She also expressed this same desire to several of her friends of long acquaintance.

6. Respondent made no attempt to contact Mrs. Evans after September 14 to determine whether she wished her will or to suggest that if she would come to his office alone, he would deliver her will to her although she lived until June 25, 1954.

7. On the 4th day of June, 1951, Mrs. Evans had executed a petition praying that her son Franklin be appointed her conservator to manage her affairs and he was duly appointed. Respondent's firm and Worlock's firm joined in her petition as counsel for the parties. On the 16th day of May, 1952, Mrs. Evans filed a petition by Worlock praying for termination of the conservatorship, and on the same date Franklin filed his final report which was approved by the Court. Mrs. Evans filed her receipt for cash funds from her conservator and he was discharged May 20, 1952. These conservatorship proceedings have no significance in this disciplinary proceeding. Respondent contended that Franklin Evans, as conservator for his mother, demanded her will. But the record is conclusive that Mrs. Evans herself personally requested her will.

8. Mrs. Evans died intestate and respondent filed objections to the appointment of Franklin F. Evans as administrator of her estate. Subsequently, on July 3, 1954, respondent filed a petition to probate Mrs. Evans' aforesaid will and codicil which he had retained in his possession. Objections to its probate by her three children were sustained, the County Court finding Mrs. Evans had revoked her will and died intestate. Respondent and Maurice F. May, a devisee in Mrs. Evans' will, appealed to the District Court where a verdict was returned for contestants. Respondent and May appealed to this court, where the judgment of the District Court was affirmed. In re Evans Estate, 163 Neb. 481, 80 N. W. 2d 127.

Count Four - Bentley Matter

1. Sometime prior to June, 1953, respondent filed a petition on behalf of his client, William Bentley, in the County Court of Buffalo County, Nebraska, praying for the appointment of a legal guardian for William's mother, Lillian Bentley, alleging she saw mentally incompetent. Mrs. Bentley and her husband Bert filed objections by their attorney, Ward Minor. Lillian Bentley, 72 years old, had prior to this proceeding, suffered a stroke of paralysis. She and her husband, Bert, 74 years old, lived at Shelton, Nebraska. Dr. C. E. Wiltse was her physician.

2. In July, 1953, while this case was pending, respondent and Minor discussed the case in the District Courtroom at Kearney. Minor considering Mrs. Bentley to be competent, and desiring a prompt disposition of the case, suggested that respondent talk to Dr. Wiltse about her condition. Minor gave no authority in this conversation to respondent to interview Mrs. Bentley. Respondent was never given permission by Minor to see or talk to Mrs. Bentley.

3. Dr. Wiltse wrote respondent a letter, dated May 13, 1953, that Mrs. Bentley had suffered a stroke on February 2, 1953; that her condition had improved with marked improvement in her ability to speak and be understood; that her mind was clear and she comprehended well in her usual conversations (Exhibit 46).

4. On Monday, September 14, 1953, respondent called David Drage, deputy sheriff of Buffalo County, Nebraska. He told Drage that Minor had given him permission to go to the Bentley home and talk to Lillian Bentley. Respondent asked Drage to take him and Mrs. Wetovick, his office secretary, to the Bentley home. On the evening of September 14, Drage took respondent and Mrs. Wetovick to Shelton.

Mrs. Wetovick often took statements of persons whom respondent interviewed.

They drove to Shelton where they picked up William Bentley; then drove to the Bert Bentley home. It was about 8:00 o'clock P. M. and after dark when they arrived. William Bentley had told respondent his mother wanted to see and talk to him according to respondent's testimony.

Respondent had not called Bert Bentley, the head of the household, for permission to come to his home or to talk to his wife.

Bert Bentley met respondent and his group on the porch of his home. Bentley testified that respondent told him he was there to take his wife's affidavit (Exhibit 5. p. 1306, l. 16 to 25). He told respondent he could not enter his home or talk to his wife, that she was seriously ill. Bentley finally consented to permit Drage to see her when

the latter said he would like to se her as an old friend. Mrs. Bentley was sitting in a wheel chair in the living room. Respondent and William walked into the Bentley home against the wishes of Bert Bentley and without his consent and after he had told them not to enter.

Bert Bentley told respondent to get out of his home. Mrs. Bentley also told respondent, Drage and William to get out and "let me alone." (Exhibit 5, p. 1344, l. 14)

Respondent testified he had intended to talk to Mrs. Bentley to determine whether or not she was mentally competent but had no intention of Mrs. Wetovick taking her statement.

Respondent testified he intended to have Mrs. Wetovick take the statements that night of three or four Shelton residents about Mrs. Bentley's mental condition but he drove back to Kearney without interviewing them and he made no attempt that night to interview Dr. Wiltse about Mrs. Bentley's mental condition, although he lived at Shelton.

5. Later a contested hearing was had before the County Judge on the petition and objections in the Bentley guardianship. Respondent testified before the referee that all Shelton residents whom he had intended to interview on September 14 were present and testified that Mrs. Bentley was mentally competent. He testified that Mrs. Bentley was present in Court; that he heard her testify and that her mind was clear and thereupon he had the guardianship action dismissed.

6. Respondent introduced into evidence Exhibit 59 with "all" exhibits attached. It consists of the deposition of Robert L. Haines, County Attorney of Buffalo County and

statements of several witnesses including deputy sheriff Drage and Bert and Lillian Bentley. These statements were taken September 18, four days after respondent's trip to the Bentley home. These parties were not sworn but were cautioned to tell the truth. Bert and Lillian Bentley stated in substance, that they did not know the respondent; they had not requested him to come to their home; that he had entered their home on the night of September 14 without their permission and against their wishes and both told him to leave; that Drage, Mrs. Wetovick and William Bentley also entered their home. In Drage's statement he said respondent called him about 7:00 o'clock P. M., September 14, and asked him if he would take him to Shelton, that he wanted to take Mrs. Bentley's statement. Drage refused because he knew respondent represented William Bentley in the guardianship case and that Ward Minor represented Bert and Lillian Bentley, and Drage didn't feel he should go; that respondent told Drage:

> "I called Mr. Minor, the attorney, and he said that it would be alright for us to go down."

Drage agreed to go on this representation; that at the Bentley home, Bert told Drage he could see Mrs. Bentley, but that respondent, Mrs. Wetovick and William Bentley could not come in, but they went into the Bentley home anyway; that Bert and Lillian Bentley both told them to leave their home, which they did accompanied by Drage.

Count Five - Blue Matter

1. Chester A. Blue, a custodian at Kearney State Teachers College, while working in the scope of his employment, fell from a ladder on November 18, 1955, breaking both feet and ankles. He was confined to a Kearney hospital for 28 days from date of accident. Dr. Thomas Elliott,

M.D. of Kearney was his physician. Dr. Herbert L. Cushing, President of the College was advised of the accident November 18 and visited Blue at the hospital five days later. They discussed Blue's accident and injuries. Cushing told Blue, at that time, that Blue could sue the college for workmen's compensation, or the college would continue to pay him his monthly salary of $233.33 until he returned to work, in lieu of compensation. Blue told Cushing that was satisfactory, he would take his monthly wages rather than compensation. Blue was disabled until April 3, 1956, when he returned to work. He was told to "take it easy." He subsequently recovered completely from his injuries. Blue testified before the referee one ankle pains him occasionally with a change of weather, but he has worked continuously since April 3, 1956, and has resumed all his custodial duties.

2. On January 11, 1956, a representative of the Nebraska Blue Cross-Blue Shield wrote Blue that his Blue Cross and Blue Shield agreements excluded recovery of medical and hospital benefits which an employer was required to pay under Workmen's Compensation laws.

3. On March 24, 1956, Blue consulted respondent about the possibility of his recovery of benefits under his Blue Cross and Blue Shield agreements. He specifically told respondent he did not want to sue Kearney State Teachers College for workmen's compensation. He told respondent that Dr. Cushing had advised him he could sue the college for compensation or the college would continue to pay him his regular monthly salary until he returned to work. That he agreed with Cushing to accept his wages.

4. Respondent, without authority from Blue, and contrary to his wishes, wrote Dr. Cushing a letter (Exhibit

6), dated April 12, 1956, (the correct date of which was April 2), that Blue had consulted him about his rights under the Nebraska Workmen's Compensation Act; that the college was liable for his hospital and medical expenses, total temporary disability and permanent partial disability. That Blue would have permanent partial disability the rest of his life; that this registered letter was a formal notice of Blue's claim under the compensation act. Dr. Cushing received this notice April 3.

5. On April 4, Blue signed the affidavit (Exhibit 9) that he never consulted respondent about a claim against the college for his injuries nor gave him authority to represent him about such a claim nor authorized him to give Cushing notice of a compensation claim.

6. Respondent wrote Blue five letters (Exhibit 8, 11, 12, 13 and 14) dated March 31, April 24, April 27, October 17 and October 30, respectively, to call at his office. Blue saw respondent three or four times between April and August, 1956, but made no request for compensation benefits. He ignored respondent's letters of October 17 and 30. Blue filed no petition with the Nebraska Workmen's Compensation Court for compensation.

7. Cushing made a detailed report (Exhibit 17) dated April 5, 1956, to the Nebraska Workmen's Compensation Court about Blue's accident and sent the Court a report (Exhibit 16) of Blue's medical expense of $84.00 and hospital expenses of $264.00.

CONCLUSIONS OF LAW

General Propositions of Law

1. "In a proceeding for the disbarment of an attorney

at law, the presumption of innocence applies, and the culpability of the person charged must be established by a clear preponderance of the evidence." State, ex rel., Nebraska State Bar Association vs. Pinkett, 157 Neb. 509, 60 N. W. 2d 641.

2. "It would appear that the findings to sustain disbarment must be sustained by a higher degree of proof than that required in civil actions, yet falling short of the proof required to sustain a conviction in a criminal action." State, ex rel., Nebraska State Bar Association v. Gudmundsen, 145 Neb. 234, 16 N. W. 2d 474.

3. "The oath taken by him as required by Section 7-104, R. S. 1943, requires a lawyer to faithfully discharge his duties; uphold and obey the constitution and laws of this state; observe established standards and codes of professional ethics and honor; maintain the respect due to Courts of justice; and abstain from all offensive practices which cast reproach on the Courts and the bar."

"A lawyer owes his first duty to the Court. He assumed his obligations toward it before he ever had a client. He cannot serve two masters and the one he has undertaken to serve primarily is the Court." State, ex rel., Nebraska State Bar Association v. Palmer, 160 Neb. 786, 71 N. W. 2d 491.

4. "A duty rests on the Court to maintain the integrity of the legal profession by disbarring lawyers who indulge in practices designed to bring the Courts or the profession into disrepute, or to perpetuate a fraud on the Courts, or to corrupt and defeat the administration of justice." State, ex rel., Nebraska State Bar Association v. Niklaus, 149 Neb. 859, 33 N. W. 2d 145.

5. "In granting a license to practice law, it is on the implied understanding that the party receiving it shall in all things demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession and the Courts." State, ex rel., Sorenson v. Scoville, 123 Neb. 457, 243 N. W. 269.

6. "The ethical standards relating to the practice of law in this state are the canons of professional ethics of the American Bar Association and those which may from time to time be approved by the Supreme Court." State, ex rel., Nebraska State Bar Association v. Wiebusch, 153 Neb. 583, 45 N. W. 2d 583.

Count One - Vielehr Matter

Respondent procured and filed the deposition of Mrs. Vielehr knowing it contained perjured testimony, consisting of material evidence which he fully intended to use in a contested action to defeat a claim against his clients. That he introduced only a portion of the deposition, not containing perjured testimony, does not relieve him of the onus of his misconduct.

"It is the duty of an attorney and counselor: * * * (3) to employ, for the purpose of maintaining the cause confided to him, such means only as are consistent with the truth; * * *." Section 7-105, R. R. S. 1943.

Any standard of proper ethical conduct requires that an attorney should not sit by silently and permit his client to commit what may have been perjury and which certainly would mislead the Court and the opposing party on a matter vital to the issue under consideration. In re Carroll, — Kentucky —, 244 S. W. 2d 474.

Canon 22 of the Canons of Professional Ethics of the legal profession provides in part:

> "The conduct of a lawyer before the Court and with other lawyers should be characterized by candor and fairness." * * *
>
> "It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes." * * *

Respondent violated Section 7-105, R. R. S. 1943 and the above Canon when he did not make a full disclosure of Mrs. Vielehr's perjured testimony to Attorney Baburek and Judge Wilson and did not advise Judge Wilson that she was respondent's client in a pending case.

Canon 29 of the Canons of Professional Ethics of the legal profession provides in part:

> "The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities."

Respondent violated the above Canon by neglecting and failing to give notice to the County Attorney of Douglas County, Nebraska. Lawyer William H. Meier notified Eugene F. Fitzgerald, Douglas County Attorney, February 4, 1955, about the perjured deposition and suggested possible prosecution of Mrs. Vielehr (Exhibit 26) and Meier's testimony (Exhibit 5, p. 1364, l. 8, 9). Respondent testified before the Advisory Committee he knew Meier had arranged for a perjury charge (Exhibit 33, p. 2092, l. 1, 2). Respondent's partner visited twice with the County Attorney (Exhibit 5, p. 1364, l. 14, 15), but there is no evidence of a prompt and timely notice by respondent or his firm.

Count Two : Molzen Matter

Respondent's present contention, expressed before the referee and contained in his brief, that he had no contract with Mrs. Molzen for a 15% contingent fee is not consistent with his testimony, pleadings or conduct. He testified he told her his fees would be 15% of the alimony recovered. His answer alleges she did not object to his proposal to charge the same. He personally put the 15% lien in the decree. He strenuously objected and tried to preserve the lien contrary to her motion to strike it from the decree. This conduct, coupled with his insistence that his 15% be paid and his acual collection of all but $50.00 of it, clearly reflect his intention to execute, fight for and preserve an agreement for his contingent fee—an agreement which was against public policy and void.

"It is generally held that a contract executed before decree of divorce is rendered providing for payment of attorney's fees in a divorce case contingent upon the amount of alimony to be subsequently obtained upon the award of a divorce is void as against public policy, since, because of the lawyer's personal interest in the litigation, it tends to prevent a reconciliation between the parties and destroy the family relationship." State ex rel. Nebraska State Bar Assocation v. Dunker, 160 Neb. 779, 71 N. W. 2d 502; See also Annotation 30 A. L. R. 183; 17 C. J. S., Contracts, Par. 235, P. 618; 5 Am. Jur. Sec. 166, p. 361.

Respondent's conduct toward Mrs. Molzen was far from honorable in the following respects:

1. He had agreed to accept $150.00 attorney fees, paid him by defendant and $50.00 for Court costs, advanced him by plaintiff, but told her the day of the divorce hearing his fee would be 15% of alimony recovered and he

ultimately collected $772.31 fees.

"The contract of employment actually made between attorney and client is controlling and the attorney is bound thereby even though he may have agreed to act for an inadequate amount, or no fee at all, unless the agreement is made under a mistake of fact which the law recognizes." Thurston v. Travelers Insurance Company, 128 Neb. 141, 258 N. W. 66.

"Under ordinary circumstances, an attorney who has contracted with his client as to the amount of his compensation will not be allowed to contract for greater compensation for such service while the service is being rendered." Olson v. Farnsworth, 97 Neb. 407, 150 N. W. 260.

2. Although he performed no legal services in its collection, he charged her and collected 15% ($150.00) based on $1,000.00 paid directly to Mrs. Molzen by her brother on his loan from defendant, approximately one year before she employed respondent.

3. She was required to employ the services of two additional attorneys to represent her as a result of respondent's persistent efforts to collect 15% attorney's fees.

"An attorney is required to exercise the utmost good faith in all his relations and dealings with his client." Diedrichs v. Stephenson, 101 Neb. 366, 163 N. W. 153.

"A judgment which determines questions not within the Court's jurisdiction, because not in issue, is to that extent void, even though the question decided may be within the general jurisdiction of the Court." Petersen v. Dethelfzs, 139 Neb. 572, 298 N. W. 155.

"A judgment of a Court upon a subject within its general jurisdiction, but which is not brought before it by

any statement or claim of the parties, and is foreign to the issues, is a nullity." Lincoln National Bank v. Virgin, 36 Neb. 735, 55 N. W. 218; Branz v. Hylton, 130 Neb. 385, 265 N. W. 16.

Canon 22 of the Canons of Professional Ethics of the legal profession, provides in part:

> "The conduct of a lawyer before the Court and with other lawyers should be characterized by candor and fairness."

Canon 13 of the Canons of Professional Ethics of the legal profession, provides:

> "A contract for a contingent fee where sanctioned by law, should be reasonable under all circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a Court, as to its reasonableness."

Respondent violated the above Canons because of his failure to discuss his 15% lien with Judge Reed before decree was entered.

"The failure to disclose or submit such a contract to the Court before decree is rendered, is a serious offense." In re Carleton, 33 Mont. 431, 84 P. 788.

Count Three - Evans Matter

In Jensen v. Priebe, 163 Neb. 481, 80 N. W. 2d 127, this Court said: That Jensen refused to give Mrs. Evans her will stating: "I have the rights of these other people to protect, and if I give you this will, you will destroy it, and I am not going to give it to you." The Court further said: "In that connection, Jensen was her attorney, without any obligation to protect the rights of other persons. She had testamentary capacity at that time and such

a reason as that given by Jensen would not prevent her or anyone duly authorized by her from demanding and receiving possession of her will and codicil from him. If under no disability, she had a right to intentionally destroy, alter or revoke her will and codicil thereto."

In the case of, In re Youngentob, 168 N. Y. S. 471, 192 App. Div. 237, the Court held, that the refusal of an attorney to deliver his client's letters and papers on demand is grounds for suspension, where the attorney did not claim any lien on them.

"Any conduct on the part of an attorney evidencing his unfitness for the confidence and trust which attend the relationship of attorney and client or unworthy of public confidence constitutes a ground for disbarment." 7 C. J. S., Attorney and Client, Sec. 19, P. 733.

Count Four - Bentley Matter

Respondent violated Canon Nine of the Canons of Professional Ethics of the legal profession. Canon Nine provides in part:

> "A lawyer should not in anyway communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel."

Count Five - Blue Matter

"An attorney is required to exercise the utmost good faith in all his relations and dealings with his client." Diedrichs v. Stephenson, 101 Neb. 366, 163 N. W. 153.

In 5 Am. Jur., p. 286, sec. 46, it is said: "An attorney must faithfully, honestly and consistently represent the interests and protect the rights of his client. He is bound

to discharge his duties to his client with the strictest fidelity, * * *, to observe the highest and utmost good faith towards him and *to obey his lawful directions.*"

The legal principle stated in C. J. S., Attorney and Client, Sec. 19, p. 733, supra, also applies. And in 7 C. J. S. Sec. 23, p. 741, it is said: "Violation of codes of ethics or any conduct on the part of an attorney which tends to bring reproach on the legal profession constitutes grounds for suspension or disbarment."

Laches

Respondent's defense of laches is without merit. He was not deprived of the testimony of witnesses on account of their death, removal or disappearance. Hearings before the Committee on Inquiry on all five charges against respondent were held in July and August 1957, but he made no attempt to obtain the depositions of Bert Bentley, who died April 6, 1958, or of Lillian Bentley, who died February 3, 1958, or of Dr. C. E. Wiltse, who died in 1958. He offered no evidence of his inability to take their depositions. Dr. Thomas Elliott had removed from Nebraska, but respondent obtained and introduced in evidence his affidavit (Exhibit 55) dated April 2, 1959, and could obviously have obtained his deposition.

These charges were filed with reasonable promptness by the Committee on Inquiry after due investigation.

Laches is an equitable doctrine and it does not result from the mere passage of time. The defense of laches exists only if it is inequitable to enforce the right of the claimant.

"Lapse of time since the acts on which a disciplinary proceeding is based is generally not available to the respondent as a defense." State ex rel. Nebraska State Bar

Association v. Bates, 162 Neb. 652, 77 N. W. 2d 302. See also State ex rel. Nebraska State Bar Association v. Merten, 142 Neb. 780, 7 N. W. 2d 874; Annotation, 45 A. L. R. 1110; 7 C. J. S. Sec. 25 P. 766.

Due Process of Law

Respondent has not been deprived of due process of law. Contrary to his contention, there is no satisfactory evidence that any member of the Committee on Inquiry was prejudiced, unfair or partial, or that the Committee's proceedings were irregular.

Article XI of the Rules Creating, Controlling and Regulating the Nebraska State Bar Association, relating to investigation and disposition of charges were carefully observed and followed. Proceedings and hearings of charges before the Committee on Inquiry of the Twelfth Judicial District of Nebraska and later before the Advisory Committee of the Nebraska State Bar Association were had strictly and carefully within Article XI above.

The proceedings before these committees were only preliminary and investigative in their nature. These committees had no authority to adjudicate the issue and exercised none. This case did not become an original action until the complaint was filed with the Clerk of this Court.

Due process of law was afforded respondent upon the filing of the verified complaint, notice to him of the complaint and affording him the opportunity to answer, his subsequent answer, his written stipulation that hearing be had upon the merits of the case and full hearing before the referee with appearances of counsel and witnesses, all within Part III of the Rules of the Supreme Court. The cases cited by respondent have no application here.

CONCLUSION

The evidence reflects that respondent is guilty of unprofessional conduct and violation of the Canons of Professional Ethics of the legal profession on all five counts of the complaint.

Respondent shows an attitude of hostility and resentment toward several laymen, some of them his former clients, and several Nebraska lawyers.

He displayed a vindicative attitude toward a Kearney lawyer (Bill of Exceptions, Vol. 3, p. 224, l. 21 forward to p. 229, l. 4, inclusive). For the purpose of this report, Mr. Minor was a credible witness.

Respondent also testified the Advisory Committee was prejudiced against him.

Respondent was not forthright, at all times, in his testimony before the referee and in several instances, he was evasive.

"The purpose of a disbarment proceeding is not so much to punish the lawyer as to determine in the public interest whether he should be permitted to practice." State, ex rel. Nebraska State Bar Association v. Wiebusch, supra; State, ex rel. Nebraska State Bar Association v. Palmer, supra; State, ex rel. Sorenson v. Ireland, 125 Neb. 570, 251 N. W. 119.

"There is no designated standard for the fixation of discipline in a case where unprofessional conduct of a member of the bar has been found to exist. Obviously, the fixation must reside in the sound discretion of the Court. It would appear that this discretion should be exercised in the light of the facts and circumstances which under

legal rules and restrictions a Court is entitled to examine." State of Nebraska, ex rel. Nebraska State Bar Association v. Mathew, 169 Neb. 194, 98 N. W. 2d 865.

Respectfully submitted,

LESLIE H. NOBLE

Referee

APPENDIX 4

OPINION OF SUPREME COURT OF NEBRASKA

STATE OF NEBRASKA, EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, v. JOHN P. JENSEN, RESPONDENT.

— N. W. 2d —

Filed October 14, 1960. No. 34487.

1. CONTINUANCES. An application for continuance is addressed to the sound discretion of the court, and the ruling thereon will not be disturbed in the absence of a clear abuse of discretion.

2. TRIAL: JUDGMENTS. Where there is a material, genuine isue of fact to be determined, a motion for summary judgment is properly overruled.

3. ATTORNEY AND CLIENT. A disciplinary proceeding is not a lawsuit with formalities of pleading, nor can technicalities be invoked to defeat the charges where undisputed facts show conduct which is ethically wrong.

4. ———. Disbarment proceedings are essentially civil and not criminal in character and the recognized rules governing civil practice are applicable thereto.

5. ———. In a proceeding for the disbarment of an attorney at law the presumption of innocence applies, and the culpability of the person charged must be established by a clear preponderance of the evidence.

That is, the court should be satisfied to a reasonable certainty that the charges are true.

6. ———. The oath taken by a lawyer, as required by statute, requires him to faithfully discharge his duties; uphold and obey the Constitution and laws of this state; observe established standards and codes of professional ethics and honor; maintain the respect due to courts of justice; and abstain from all offensive practices which cast reproach on the courts and the bar.

7. ———. A lawyer owes his first duty to the court. He assumed his obligation toward it before he ever had a client. He cannot serve two masters, and the one he has undertaken to serve primarily is the court.

8. ———. A duty rests on the courts to maintain the integrity of the legal profession by disbarring or suspending attorneys who indulge in practices designed to bring the courts or the profession into disrepute, or to perpetrate a fraud on the courts, or to corrupt and defeat the administration of justice.

9. ———. In granting a license to practice law it is on the implied understanding that the party receiving it shall in all things demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts.

10. ———. The ethical standards relating to the practice of law in this state are the Canons of Professional Ethics of the American Bar Association which have been adopted by the Supreme Court of this state and those which may from time to time be approved by the Supreme Court of this state.

11. ———. Any conduct on the part of an attorney evidencing his unfitness for the confidence and trust which attend the relationship of attorney and client or which is unworthy of public confidence constitutes a ground for suspension or disbarment.

12. ———. Violation of codes of ethics or any conduct on the part of an attorney in his professional capacity which tends to bring reproach on the legal profession constitutes ground for suspension or disbarment.

13. ———. The purpose of a disbarment proceeding is not so much to punish the attorney as it is to determine in the public interest whether he should be permitted to practice law.

14. APPEAL AND ERROR. Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have adopted one version of the facts rather than the opposite.

15. ATTORNEY AND CLIENT. In a disciplinary action against an attorney the referee is charged with the duty to determine the truth, and has the right to question witnesses on both sides of the litigation to reach a determination as to the true facts, and by doing so such referee has not committed error.

16. ATTORNEY AND CLIENT: DIVORCE. Generally, a contract executed before decree is rendered for payment of attorney's fees in a divorce action contingent upon the amount of alimony to be subsequently obtained upon the award of a divorce is void as against public policy, since because of the lawyer's personal interest in the litigation it tends to prevent a reconciliation between the parties and destroy the family relationship.

17. ATTORNEY AND CLIENT. The conduct of the lawyer before the court and with other lawyers should be characterized by candor and fairness.

18. WITNESSES. As a general rule, a party calling a witness vouches for his credibility and is ordinarily bound by any evidence he gives which is not contradicted or shown to be unreliable by evidence which

would justify the trier of facts in arriving at a different conclusion.

19. ———. While the plaintiff who calls defendant as a witness cannot impeach his character for veracity generally, the plaintiff may show that the whole or any part of what defendant has sworn to is untrue either by his own examination and the improbability of his story or by other contradictory evidence material to the case.

20. EQUITY. Laches is an equitable doctrine and it does not result from the mere passage of time.

21. ATTORNEY AND CLIENT: EQUITY. Lapse of time since the acts on which a disciplinary proceeding is based is generally not available to the respondent as a defense.

22. CONSTITUTIONAL LAW. The term "due process of law" has been often defined as such an exertion of the powers of government as are sanctioned by the settled maxims of the law and under such safeguards for the protection of individual rights as those safeguards prescribed for the class of cases to which the one in question belongs, and is satisfied by a proceeding applicable to the subject matter and conformable to such general rules as affect all persons alike.

23. ———. Due process of law may be said to be satisfied whenever an opportunity is offered to invoke the equal protection of the law by judicial proceedings appropriate for the purpose and adequate to secure the end and object sought to be attained.

24. COURTS: ATTORNEY AND CLIENT. Each state has complete control over the remedy which it offers to suitors in its courts. The bar Committees are clothed by rule with the power to make investigations and to hold hearings in order to determine whether the facts are supported by credible evidence and whether or not such facts are sufficient to warrant the institution of a proceeding to discipline or disbar an attorney.

Original action. *Judgment of suspension.*

Clarence S. Beck, Attorney General, and *Gerald S. Vitamvas*, for relator.

Joseph T. Votava, Paine & Paine, and *John P. Jensen*, for respondent.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an original disciplinary proceeding brought in the name of the State of Nebraska on the relation of the Nebraska State Bar Association, relator, against John P. Jensen, a lawyer duly admitted and licensed to practice his profession in this state. On the filing of the complaint the matter was duly referred to a referee for hearing, report, and recommendation. Hearing was had, report made, and the referee found the respondent guilty of unethical and unprofessional conduct. The referee made no special recommendation, but left the matter of discipline to this court. Exceptions were taken by the respondent to both the referee's findings of fact and the recommendation.

The duty rests on this court to maintain the integrity of the legal profession by disciplining lawyers who indulge in practices designed to bring the courts or the profession into disrepute, or to perpetrate fraud on the courts, or to corrupt and defeat the administration of justice. We necessarily review the evidence adduced in such proceedings de novo to determine if discipline should be imposed, and, if it should, the extent thereof. See State ex rel. Nebraska State Bar Assn. v. Fisher, 170 Neb. 483, 103 N. W. 2d 325.

Prior to setting forth certain principles which are applicable in disciplinary proceedings, we make reference to certain motions and stipulations filed in this court which motions this court has not ruled upon or disposed of.

On December 24, 1958, there was filed in this court a stipulation wherein the parties, pursuant to an oral agreement made December 5, 1958, and concurred in by the referee, agreed that this cause be set for hearing before the referee on April 20, 1959.

On January 17, 1959, the parties stipulated that all of the evidence taken before the Committee on Inquiry on July 18, and August 6, 1957, all of the evidence offered at the hearing before the Advisory Committee on May 23, 1958, and all depositions taken by either party since these proceedings were filed in this court might be offered and received in evidence the same as if said witnesses were present in court and testified, all subject to the objections as to relevancy, competency, and materiality.

On March 23, 1959, by stipulation of the parties, it was agreed that the relator's objections to the respondent's request for admissions, and relator's objections to respondent's request for interrogatories previously filed in the office of the Clerk of the Supreme Court March 11, 1959, and noticed before this court for hearing on April 6, 1959, might be submitted to the referee for hearing and determination instead of to this court, at such time and place as the referee might determine or designate.

On February 28, 1959, the respondent served request for interrogatories and request for admissions on counsel for the relator. The requests for interrogatories and admissions were of great length and contained certain sub-

parts. The relator made response to some of the requests, a part of which were denied for the reasons stated therein, and the balance were objected to. Such objections were sustained by the referee on April 10, 1959.

On April 17, 1959, respondent filed a motion in this court that this court enter an order holding that the responses of the relator, in legal effect, constituted admissions by the relator of the requests of the respondent and might be relied upon by the respondent as admissions of the relator.

On April 17, 1959, the respondent filed a motion requesting this court to review the order of the referee as to objections to request for interrogatories and request for admissions, and to rule on the question as to whether or not the respondent was entitled to discovery by request for admissions to interrogatories as provided in sections 25-1267.37 to 25-1267.39, R. R. S. 1943. The above motions were noted for hearing before this court and were not ruled on for the reason that the matters contained therein were referred to and were before the referee for determination.

Under the circumstances, the motions of the respondent filed in this court on April 17, 1959, were not timely filed and are hereby overruled.

The requests for admissions, which were objected to, were responded to by the relator in good faith as contemplated by section 25-1267.41, R. R. S. 1943. The denied parts were honestly set forth and the reasons given why the relator could not truthfully admit or deny the matter in compliance with subdivision (1) of said section. The trial before the referee proceeded on the theory that such responses were adequate, and evidence was introduced for

and against the matters the respondent now seeks to have conclusively established. The respondent's objections should have been directed to the referee.

In the light of the foregoing, we find that the respondent was in no way prejudiced.

On April 17, 1959, the respondent filed a motion in this court for summary judgment. The respondent also moved for a continuance before the referee of this matter until such time as a motion for summary judgment had been ruled upon and until such time as a number of other motions also filed in this court had been ruled upon, and for other reasons not necessary to mention. This motion was overruled.

An application for continuance is addressed to the sound discretion of the court, and the ruling thereon will not be disturbed in the absence of a clear abuse of discretion. Stratton v. Dole, 45 Neb. 472, 63 N. W. 875.

The referee being an arm of the court, his actions providing for and holding a hearing are controlled by the rules relating to such proceedings in a court. The referee therefore did not err in denying a continuance.

With reference to the motion for summary judgment, respondent states that there have been no counter showings filed by the relator, therefore it must be presumed that the showings attached to the motion for summary judgment have been accepted as correct by the relator. This motion was not ruled on by this court for the reason that the whole matter had been referred to the referee.

Section 25-1332, R. R. S. 1943, provides in part: "The adverse party prior to the day of hearing may serve op-

posing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The complaint, the answer thereto, and the reply clearly show that there is a genuine issue of fact to be determined in the instant case, as well as other matters appearing in the transcript relating thereto. The motion for summary judgment is overruled. See Rehn v. Bingaman, 157 Neb. 467, 59 N. W. 2d 614.

On July 3, 1958, the respondent filed a motion in this court that the charges made against him were indefinite and uncertain, and moved that the relator be required to make the complaint more definite and certain. The primary objection to the complaint was that there was a failure to set forth which specific canons of professional ethics the respondent violated, and to set forth what standard of professional conduct, rules or regulations, statutes and laws were violated by the respondent. On September 26, 1958, this court overruled the above motion.

Revised Rules of the Supreme Court, Part III, Disciplinary Proceedings, Rule 3, provides in part: "Proceedings shall be initated by the relator filing a verified complaint setting forth the grounds thereof with reasonable definiteness."

In the case of In re Becker, 16 Ill. 2d 488, 158 N. E. 2d 753, it was held: "A disciplinary proceeding is not a lawsuit with formalities of pleading, nor can technicalities be invoked to defeat the charges where undisputed facts show conduct which is ethically wrong, * * *." See, also, 7 C. J. S., Attorney and Client, § 31, p. 775.

There is no doubt but that the respondent knew the charge or charges he was defending against. We find no merit in the respondent's contention.

Considering the respondent's contentions, we set forth certain principles which are applicable in disciplinary proceedings.

"Disbarment proceedings are essentially civil and not criminal in character and the recognized rules governing civil practice are applicable thereto." State ex rel. Nebraska State Bar Assn. v. Fisher, *supra*.

In a proceeding for the disbarment of an attorney at law the presumption of innocence applies, and the culpability of the person charged must be established by a clear preponderance of the evidence. See State ex rel. Nebraska State Bar Assn. v. Pinkett, 157 Neb. 509, 60 N. W. 2d 641. That is, the court should be satisfied to a reasonable certainty that the charges are true. See, Revised Rules of the Supreme Court, Part III, Dicsiplinary Proceedings, Rule 1; State ex rel. Nebraska State Bar Assn. v. Price, 144 Neb. 542, 13 N. W. 2d 714; State ex rel. Nebraska State Bar Assn. v. Gudmundsen, 145 Neb. 324, 16 N. W. 2d 474.

The oath taken by a lawyer, as required by section 7-104, R. R. S. 1943, requires him to faithfully discharge his duties; uphold and obey the Constitution and laws of this state; observe established standards and codes of professional ethics and honor; maintain the respect due to courts of justice; and abstain from all offensive practices which cast reproach on the courts and the bar. A lawyer owes his first duty to the court. He assumed his obligations toward it before he ever had a client. He cannot serve

two masters, and the one he has undertaken to serve primarily is the court. See State ex rel. Nebraska State Bar Assn. v. Palmer, 160 Neb. 786, 71 N. W. 2d 491.

A duty rests on the courts to maintain the integrity of the legal profession by disbarring or suspending attorneys who indulge in practices designed to bring the courts or the profession into disrepute, or to perpetrate a fraud on the courts, or to corrupt and defeat the administration of justice. See State ex rel. Nebraska State Bar Assn. v. Niklaus, 149 Neb. 859, 33 N. W. 2d 145.

In granting a license to practice law it is on the implied understanding that the party receiving it shall in all things demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts. See State ex rel. Sorensen v. Scoville, 123 Neb. 457, 243 N. W. 269.

The ethical standards relating to the practice of law in this state are the Canons of Professional Ethics of the American Bar Association which have been adopted by the Supreme Court of this state and those which may from time to time be approved by the Supreme Court of this state. State ex rel. Nebraska State Bar Assn. v. Wiebusch, 153 Neb. 583, 45 N. W. 2d 583.

Any conduct on the part of an attorney evidencing his unfitness for the confidence and trust which attend the relationship of attorney and client or which is unworthy of public confidence constitutes a ground for suspension or disbarment. State ex rel. Nebraska State Bar Assn. v. Richards, 165 Neb. 80, 84 N. W. 2d 136.

Violation of codes of ethics or any conduct on the part of an attorney in his professional capacity which tends

to bring reproach on the legal profession constitutes ground for suspension or disbarment. State ex rel. Nebraska State Bar Assn. v. Richards, *supra*.

The purpose of a disbarment proceeding is not so much to punish the attorney as it is to determine in the public interest whether he should be permitted to practice law. State ex rel. Nebraska State Bar Assn. v. Wiebusch, *supra*.

While this case is for trial de novo in this court, we recognize the rule that the referee heard and saw the witnesses as they testified. He had a better opportunity to appraise the credibility of the witnesses than does this court. While this court tries appeals in equity de novo, we must necessarily consider the findings of the referee on matters that are in irreconcilable conflict. Jensen v. Manthe, 168 Neb. 361, 95 N. W. 2d 699; Dunbier v. Rafert, 170 Neb. 570, 103 N. W. 2d 814.

The respondent complains that the referee unduly interrogated witnesses, and indicates that in interrogating the witnesses the referee did so unfairly and not impartially.

There is no impropriety in a trial court interrogating witnesses regarding a fact under investigation, when the tendency is only to develop the truth, and is calculated in nowise to influence the jury, save as the testimony will assist it to arrive at a correct conclusion on the questions of facts in issue. Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758.

In this action the referee is the trier of facts. The referee is charged with the duty to determine the truth and has the right to question witnesses on both sides of

the litigation, which he did. We find no error in the referee's action in such respect. In any event, all the evidence before the referee is before this court to review.

This action charges the respondent with unethical and unprofessional conduct in five separate matters. The answer is of extensive length and comprises a recital of facts in each charge to considerable extent. However, the answer to each charge may be considered as a denial of unethical or unprofessional conduct on the part of the respondent. The reply of the relator contains certain admissions of fact as pleaded in the respondent's answer and denies other facts appearing therein.

The record in this case is rather voluminous. Without repeating all the details and testimony of this lengthy record, we think the following résumé of certain salient, significant facts is sufficient to illustrate and substantiate our decision in this matter.

Paragraph V of the complaint charged the respondent with unethical and unprofessional conduct for failure to deliver the last will and testament executed by Lydia F. Evans and left by her in the respondent s possession after she had made repeated requests of him to deliver to her her last will and codicil attached thereto. The record shows that the respondent first became acquainted with Lydia F. Evans when he drew a will for her in April 1948. There was a petition for appointment of a guardian filed in the county court of Buffalo County by her son Franklin F. Evans. An answer was filed to this petition on April 26, 1948. This guardianship proceeding was dismissed. The respondent transacted other legal business for Lydia F. Evans on occasions. Later, Lydia F. Evans obtained the will executed by her in April 1948, and destroyed it.

Mrs. Evans had three children living, Martha Priebe, Galen Evans, and Franklin F. Evans, and three nephews living, Samuel M. Forney, Maurice May, and John May. Samuel M. Forney was an ordained minister of the Chuch of the Brethern, the same church Mrs. Evans attended. In January 1951, Samuel M. Forney made an appointment for his aunt, Lydia F. Evans, to go the office of the respondent to make a will. Forney and the respondent picked her up in the respondent's car. Lydia F. Evans executed a last will and testament on January 22, 1951, and nominated the respondent as executor, giving him full power, at his discretion, to sell at public or private sale any real or personal property without order of the court, and to settle, compromise, or to adjust all claims, charges, and debts in favor of or against the estate. On February 8, 1951, Lydia F. Evans had the respondent make a codicil to her will. The respondent testified that at the time Lydia F. Evans executed the will of January 22, 1951, he wanted to know his specific instructions with reference to the will; that he did not want to be involved in a situation where anybody could come to his office and get the will; and that Lydia F. Evans' instructions to him were as follows: "Mr. Jensen, this I think is the last will that I will ever make. This will is to be kept by you. You are not to give it to anyone. I will not send anyone for it. And if I come up here with anyone, you are not to give it either to them or to me." It appears that the wills executed by Lydia F. Evans in 1948 and 1951 were quite similar. Both wills made provisions for charitable bequests to the church and church-related beneficiaries. Lydia F. Evans' nephew, Samuel M. Forney, was the residuary legatee under the will made January 21, 1951.

On or about January 27, 1951, Franklin F. Evans saw

his mother, Lydia F. Evans, going to the respondent's office, so he followed her to the office. Mrs. Evans requested her will, but the lady at the desk told Mrs. Evans she could not give the will to her. Thereafter Franklin and his mother left the respondent's office. At another time, about a week or so later, Franklin F. Evans again saw his mother going to respondent's office, and he again followed her to the office. Mrs. Evans was talking to the respondent's law partner, and Franklin heard her ask for the will. She received a copy of the will, and Mrs. Evans stated that she wanted the signed copy, but respondent's partner would not give her the original will.

On June 4, 1951, Lydia F. Evans filed a petition in the county court of Buffalo County alleging that she was 82 years of age and, by reason of age and health, she was unable to handle all her business affairs, to wit, the management of her property and the collection of rents, without a conservator to advise her and act for her in such matters, and alleged that her son Franklin F. Evans was a suitable person to act as such conservator. She was represented in such proceedings by the respondent and attorney Worlock. Franklin served as conservator of the estate of Lydia F. Evans until May 20, 1952, when, at her request, the conservatorship was terminated. On December 3, 1952, Worlock mailed the respondent a check for $150 as his part of the attorneys' fees collected in the conservatorship proceedings. There is no question but that the respondent knew and had notice of such proceedings and the manner in which the same were handled and concluded.

Franklin F. Evans testified that on September 14, 1951, he and his mother went to the respondent's office, and when they arrived at said office his mother said she

wanted her will. The respondent shouted: "You're not fit to make another will," and he would not give up the will. He further said that he had the interests of other people to protect who were beneficiaries under the will; and that he could not give the will up without a court order. The respondent denied that he ever stated that he would not deliver the will because he had to protect the interests of other people who were beneficiaries under the will.

It appears that on September 14, 1951, both Franklin F. Evans and his mother asked the respondent for Mrs. Evans' will. The respondent testified that on September 14, 1951, when Franklin and Lydia F. Evans were in his office, Franklin was angry and wanted the respondent to produce the will immediately and give it to his mother. Franklin said that she wanted it turned over to him. The respondent told Franklin that he did not believe, as conservator, Franklin was entitled to the will. The respondent said: "Aunt Liddy, * * * do you want me to give this son of yours this will?" She said: "Well, yes." She further said that Franklin told her if she would get the will and give it to him he would have it fixed so she could give her property to the people to whom she wanted to give it. There ensued some sort of argument and as a result Franklin F. Evans called attorney Worlock to come to the respondent's office. When Worlock arrived, the respondent, Lydia F. Evans, and Franklin F. Evans were in respondent's office. Worlock said: "John, why don't you give Mrs. Evans her will? She is entitled to it." Instead of answering Worlock directly, the respondent said: "Aunt Lydia, I am not going to give you this will. If I give it to you, you will destroy it; you will not be in a position to make another will, and I have the interests of these parties to protect, and

I am not going to give you the will."

Worlock testified that he advised Lydia F. Evans to go to the respondent's office and ask for the will. After this conversation in the respondent's office on September 14, 1951, Worlock, on September 15, 1951, at Lydia F. Evans' request, prepared a revocation of the will of Lydia F. Evans dated January 22, 1951, and the codicil thereto. With respect to the revocation of the will, Worlock talked to Lydia F. Evans alone. She told Worlock that she wanted that will and codicil destroyed; that she did not want another will; that she wanted to revoke her will and the codicil thereto; and that she wanted her property to go to her children.

After the conversation had in the respondent's office between Franklin F. Evans, Lydia F. Evans, and Worlock, the respondent called Samuel M. Forney and told him that Franklin F. Evans had been to the respondent's office trying to get the will, and suggested that Forney do whatever he felt necessary to protect the rights of Mrs. Evans, Forney, or anyone else. The respondent also called Maurice May and told him to do whatever was necessary to protect his rights relating to the will.

There is testimony by witnesses in behalf of the respondent that under the instructions given to the respondent by Lydia F. Evans it would have been wrong, under the circumstances, for the respondent to deliver the will to Lydia F. Evans

Lydia F. Evans told her son Galen Evans that she had gone to respondent's office numerous times to get her will, and the respondent would not give it to her. Lydia F. Evans also told several of her friends during the summer of 1951 that the respondent would not let her have

her will. She also told her daughter that the respondent would not give her her will and she wanted it back. She also requested her son Franklin to help her get her will back. Later Lydia F. Evans conveyed and transferred her property to her children.

On June 25, 1954, Lydia F. Evans died. The respondent filed a petition in the county court of Buffalo County July 3, 1954, for the probate of the will of Lydia F. Evans, deceased, executed on January 22, 1951. Objections were filed to the probate of the will, together with a copy of the recovation of the will, and codicil, on July 30, 1954. Maurice May and the respondent filed a reply on May 11, 1955, showing Dryden and Jensen (the latter being the respondent), and Munro and Parker, as attorneys. The county court rendered judgment against the respondent, and an appeal was taken to the district court. The proponents were represented by attorneys Munro and Parker in the district court. The district court sustained the motion of the contestants against the proponents in part, and instructed the jury that the mental capacity of Lydia F. Evans at the time of the execution of the revocation of her last will and testament had been established by the evidence, and limited the issue in the case to undue influence. The jury found against the proponents on the issue of undue influence, and this judgment was affirmed by this court. See Jensen v. Priebe, 163 Neb. 481, 80 N. W. 2d 127.

From a review of the record relating to the Evans matter, the evidence is overwhelming that during the time Lydia F. Evans executed her will on January 22, 1951, and the codicil in February 1951, she was mentally competent to do so; and that when she requested the respondent to deliver her will to her on September 14, 1951,

and at the time she executed the revocation of her will and codicil on September 15, 1951, Lydia F. Evans was competent to perform such acts. Samuel M. Forney testified that he did not remember a time when Lydia F. Evans was incompetent; and that she was a strong-minded woman, had a mind of her own, knew the nature and extent of her property, and the natural objects of her bounty. Galen Evans, a son of Lydia F. Evans, testified that his mother had a mind of her own. Martha Priebe, her daughter, testified that her mother had a will of her own. In fact, there is no competent evidence that up to the date of her death Lydia F. Evans was incompetent to make a will or revoke a will she had made, or that she could be unduly influenced with reference to her property at any time.

At the time Lydia F. Evans executed her will on January 22, 1951, she was possessed of real estate and personal property of the approximate value of $125,000. The respondent had represented her over a period of years prior to January 22, 1951, and knew the nature, extent, and value of her property. The respondent made no attempt to contact Lydia F. Evans after September 14, 1951, to determine whether she wanted her will, or to suggest that if she would come to the office alone he would deliver it to her, although she lived until June 25, 1954. The record is clear that Lydia F. Evans herself, personally, requested the respondent to deliver her will to her

In 7 C. J. S., Attorney and Client, § 19, p. 733, it is said: "Any conduct on the part of an attorney evidencing his unfitness for the confidence and trust which attend the relationship of attorney and client or unworthy of public confidence constitutes a ground for suspension or disbarment." See, also, State ex rel. Nebraska State Bar Assn. v. Wiebusch, *supra*.

"Violation of codes of ethics or any conduct on the part of an attorney in his professional capacity which tends to bring reproach on the legal profession constitutes ground for suspension or disbarment." 7 C. J. S., Attorney and Client, § 23, p. 741.

We conclude that under the evidence the respondent was duty bound to give Lydia F. Evans her will upon her demand for it. There is no legal or logical reason why the respondent should not have complied with this request. We are in accord with the referee's finding on this matter that the respondent was guilty of unethical and unprofessional conduct.

With reference to paragraph No. VI of the complaint titled the Bentley matter, the complaint alleged in part that on September 14, 1953, the respondent was attorney for William Bentley in the matter of the guardianship of Lillian Bentley alleged to be mentally incompetent, a proceeding in the county court of Buffalo County, wherein William Bentley, the son of Lillian Bentley, petitioned that his mother be placed under guardianship. This petition was filed in the spring of 1953, and at all times during said action Lillian Bentley was represented by Ward W. Minor, an attorney at Kearney, Nebraska. The complaint alleged that the respondent went to the Bentley home for the purpose of obtaining a statement from Mrs. Bentley, knowing that she was represented by counsel, and to obtain such a statement without the permission of her counsel. Lillian Bentley and her husband, Bert Bentley, resisted this guardionship. The respondent and Minor discussed this case prior to trial, during the latter part of June or first part of July 1953, at which time Minor suggested that the respondent talk to Dr. Wiltse who was Lillian Bentley's doctor. Minor testified that he never at

any time gave respondent permission to talk to his client, Lillian Bentley, or to her husband Bert Bentley; that he not recall giving permission to the respondent to talk to his client Lillian Bentley; and that he did not recall any other conversation with the respondent about this matter prior to the discussion setting the case for trial, or with respondent's secretary being present, or any conversation between him and the respondent. The respondent testified that Minor told him to see Dr. Wiltse and get a report from him, and early in March 1953, he saw Dr. Wiltse. The repondent did receive a report from Dr. Wiltse dated May 13, 1953. The doctor's report was to the effect that Lillian Bentley's mind was clear; and that she was competent and could comprehend. The respondent further testified that toward the end of June or July 1953, he met Minor in the courthouse and told Minor that William Bentley had told the respondent four or five times that his mother wanted to see the respondent; that there were also certain persons who cared for Lillian Bentley and knew about her condition; and that Minor told the respondent to go and see his client, Mrs. Bentley. The respondent testified that at a later date he telephoned Minor with reference to seeing Mrs. Bentley and told him that if nothing was wrong with her mind, or if she was competent, he would dismiss the guardianship proceedings, and Minor replied: "It's alright; I am sure you will see she is o.k." The respondent's secretary corroborated the respondent's testimony as above set forth in most respects.

The respondent made arrangements with David Drage, a deputy sheriff of Buffalo County, to take respondent and his secretary to see Mrs. Bentley who lived at Shelton, Nebraska. The reason for this was that Bert Bentley was presumed to be a violent person. The respond-

ent told William Bentley and Drage that he had permission from Minor to talk to Mrs. Bentley. The group picked up William Bentley in Shelton on the way to the Bentley home. The respondent's purpose in talking to Mrs. Bentley was to see if she was mentally competent, and if he thought she was he was going to dismiss the guardianship proceedings. When the group arrived at the Bentley home, the respondent asked Drage to go into the house first and ask Mrs. Bentley if she wanted to see him. Drage went into the house, and came out and told the respondent that Mrs. Bentley wanted to see him. The respondent went into the house with Drage and met Bert Bentley a few feet inside the kitchen. Bert Bentley told them he did not want anyone talking to his wife. The respondent and Drage then left the house. The witnesses whose statements respondent wanted to take were not present, and the statements were not taken. On no occasion did Mrs. Bentley tell the respondent to get out of the house and stay out, and there was no conversation between the respondent and Lillian Bentley.

The respondent introduced into evidence an exhibit the deposition of Robert L. Haines, and certain exhibits in addition thereto. The respondent told Drage that he wanted to take a statement from Mrs. Bentley, but did not tell him what it was. In a statement Drage made shortly after the incident he related a different story than that told by him before the Committee on Inquiry. Drage stated that when the party arrived at the house, all three of them got out of the car and proceeded up to the porch where they were met by Bert Bentley. Bert Bentley told them that Drage could go in to see Mrs. Bentley, but the others could not. Drage went into the house and was visiting with Mrs. Bentley when William

Bentley, the respondent, and the respondent's secretary came in and stopped just inside the door. Bert Bentley told them to get out. The respondent announced to Bert Bentley: "I am here to take an affidavit from your wife." Bert Bentley refused to allow him to talk to his wife, and an altercation ensued. The respondent and his party left. Lillian Bentley also told them to get out and leave her alone. Mrs. Bentley's statement was taken by Robert L. Haines, wherein she stated that she never invited the respondent to her home, nor did she give him permission to come to her home, and never gave her attorney permission for the respondent to come to her home. Subsequently, Bert Bentley died.

It is true, the respondent did not have the opportunity to interview Lillian Bentley. He had previously received a report from Dr. Wiltse in which the doctor reported the state of Mrs. Bentley's mind and that it was clear, and she was able to comprehend. Also in this report the doctor explained that Mrs. Bentley previously suffered a stroke and her condition had improved markedly from February 9, 1953. The respondent admits that he intended to talk to Mrs. Bentley, but denies that he intended to take a statement from her.

The relator's contention is that the respondent never received Ward Minor's permission to interview his client, and the mere fact that the respondent was prevented by Bert Bentley from keeping his announced plan does not prevent or excuse him from a violation of Canon 9, Canons of Professional Ethics.

Canon 9 provides in part: "Negotiations With Opposite Party. A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate

or compromise the matter with him, but should deal only with his counsel." See, also, Lumbermens Mutual Casualty Co. v. Chapman, 269 F. 2d 478; Turner v. State Bar. 36 Cal. 2d 155, 222 P. 2d 857.

In the light of all the testimony relating to the Bentley matter, we conclude that the respondent violated the Code of Professional Ethics by his conduct, as determined by the referee. As the respondent stated, he could have taken the deposition of Lillian Bentley. True, the evidence in relation to this charge is in irreconcilable conflict, but we, under the rule heretofore announced relating to an equity action, conclude that the referee did not err as contended for by the respondent.

Paragraph No. IV of the complaint relates to the Molzen matter. The respondent represented Hazel Molzen in a divorce case. She employed him on March 22, 1951. He prepared a petition for divorce in her behalf and filed it on the same date. Her husband, Cecil W. Molzen, was represented by attorney Louis A. Holmes. The defendant's answer was filed June 2, 1951. On July 31, 1951, a decree was entered showing that a trial was had at which evidence was offered by the plaintiff but none by the defendant. On the same day there was filed an agreement in contemplation of divorce signed by Cecil W. Molzen in Minnesota on June 19, 1951. Also on July 31, 1951, the respondent's firm filed an attorney's lien in the district court. The respondent told Mrs. Molzen that the only fair thing to do, since the defendant's property was in Minnesota, was that he should ask the court to fix his attorney's lien at 15 percent, and that he would put it in the decree. Respondent prepared the decree before going into court on the date the trial was had. There was no testimony about attorney's fees at the hearing at the time

the divorce was granted to the plaintiff. The respondent had not discussed this 15 percent attorney's lien provision with the district judge before he prepared the decree, but had discussed the matter with his client.

The parties to this divorce action had entered into an agreement and a property settlement whereby the plaintiff was to receive $5,500. Of this amount, $1,000 was received by her as a result of an assignment of a loan made by Cecil W. Molzen, her husband, to her brother. The respondent received in fees for this action the amount of $772.31. On December 4, 1951, Mrs. Molzen discharged the respondent and the members of his firm as attorneys representing her. A motion was filed in her behalf to strike from the decree the provision as follows: "Plaintiff's attorney is given a lien on amounts due and owing from defendant to plaintiff in the amount of 15%." This motion was based on the fact that such a provision was beyond the authority of the court to enter in the decree, because the same was not shown by the pleadings. The respondent filed his application for leave to intervene, which was granted. The respondent, on April 3, 1953, filed an answer to the plaintiff's motion to strike, in which the respondent asserted his right to the 15 percent attorney's fee lien. The answer also affirmed the fact that the respondent had discussed the 15 percent provision appearing in the decree with his client prior to the entry of the decree. On February 5, 1954, the district court found that the 15 percent provision was included in the journal entry without any evidence having been taken thereon, that no actual agreement had been made, and struck such provision mentioned above from the decree.

The relator contends that the provision set forth in the decree charging 15 percent of the amount of alimony

actually to be collected was, in effect, a contingent fee contract. In addition, the relator contends that the entry of the provision in the decree constituted a fraud upon the court.

In State ex rel. Nebraska State Bar Assn. v. Dunker, 160 Neb. 779, 71 N. W. 2d 502, this court said: "Generally, a contract executed before decree is rendered for payment of attorney's fees in a divorce action contingent upon the amount of alimony to be subsequently obtained upon the award of a divorce is void as against public policy, since because of the lawyer's personal interest in the litigation it tends to prevent a reconciliation between the parties and destroy the family relationship." Annotation, 30 A. L. R. 188, cites and discusses authorities supporting such statement. They are too numerous to cite here. See, Jordan v. Westerman, 62 Mich. 170, 28 N. W. 826, 4 Am. S. R. 836; McCurdy v. Dillon, 135 Mich. 678, 98 N. W. 746; 17 C. J. S., Contracts, § 235, p. 618; 5 Am. Jur., Attorneys at Law, § 166, p. 361.

The respondent contends that there was no contract for fees prior to the day the matter was terminated, that, in effect, the provision for 15 percent applied only to the alimony collected after the property settlement was entered into. The defendant, Cecil W. Molzen, had loaned $1,000 to the plaintiff's brother. As a part of the property settlement prior to the divorce, this $1,000 was assigned to Mrs. Molzen. Mrs. Molzen had this $1,000 from her brother and did not want Cecil W. Molzen trying to collect this amount from her brother again. This $1,000 had been paid to Mrs. Molzen a year before when she was in the hospital. No legal services were required to collect this $1,000, other than to include the item in the property settlement agreement, and this fact is admitted

by the respondent. It is apparent that the respondent was basing his percentage fee on the total amount of alimony awarded and not just the collection of awarded alimony after the judgment had been rendered. This is wrong and unethical under the holding in State ex rel. Nebraska State Bar Assn. v. Dunker, *supra*.

The respondent prepared the decree and inserted this provision in it. He had not discussed the matter with the district judge before inserting it in the decree. No evidence was presented on the divorce trial concerning the fee. On February 5, 1954, the court found that the 15 percent provision was included in the journal entry without evidence being taken thereon and that no actual agreement had been made, and the court struck that provision from the decree. While it may be assumed that the district judge read the decree, the respondent failed to fully inform the judge as to its provision improperly incorporated therein.

Canon 22 of the Canons of Professional Ethics, provides in part: "The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness."

We conclude that in the Molzen matter the conduct of the respondent was such that he acted in an unprofessional manner and perpetrated a form of fraud upon the court within the provisions of Canon 22 of the Canons of Professional Ethics. The referee so found and we are in accord with his findings in such respect.

The respondent asserts that the relator offered in evidence all of the testimony of the parties offered before the Committee on Inquiry, all of the evidence in the case of Jensen v. Priebe, *supra*, and other evidence; and that

the relator knew, at the time of making such offers, exactly what evidence was contained therein.

The respondent cites Edgar v. Omaha Public Power Dist., 166 Neb. 452, 89 N. W. 2d 238, wherein this court said: "As a general rule, a party calling a witness vouches for his credibility and is ordinarily bound by any evidence he gives which is not contradicted or shown to be unreliable by evidence which would justify the trier of facts in arriving at a different conclusion." See, also, 58 Am. Jur., Witnesses, § 796, p. 441.

At the trial of this matter before the referee, the relator offered the proceedings before the Committee on Inquiry in evidence, pursuant to a stipulation entered into by the parties herein. The respondent first objected to the reception of this evidence, but subsequently withdrew his objection as to a part of the testimony, and has not claimed error or improper reception of evidence as to the balance thereof.

This court, in Krull v. Arman, 110 Neb. 70, 192 N. W. 961, said, quoting from Thorp v. Leibrecht, 56 N. J. Eq. 499, 39 A. 361: "While a plaintiff who calls defendants as his witnesses cannot impeach their character for veracity generally, he may show that the whole or any part of what they have sworn to is untrue either by their own examination and the improbability of their own story or by other contradictory evidence material to the case." See, also, Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112; Trask v. Klein, 150 Neb. 316, 34 N. W. 2d 396; Zimman v. Miller Hotel Co., 95 Neb. 809, 146 N. W. 1030.

Under the true rule herein set forth, while a witness may not be impeached by the party calling him, the testimony of such a witness may be contradicted. The evi-

dence submitted by the relator certainly contradicted the testimony of the respondent and was entitled to as much weight as the referee concluded it merited, and as this court concluded it merited on a trial de novo.

The respondent raises the defense of laches, contending that he was prejudiced by the delay in filing and in investigating the charges as shown by the complaint.

In State ex rel. Nebraska State Bar Assn. v. Bates, 162 Neb. 652, 77 N. W. 2d 302, this court said: "Laches is an equitable doctrine and it does not result from the mere passage of time."

Lapse of time since the acts on which a disciplinary proceeding is based is generally not available to the respondent as a defense. See State ex rel. Nebraska State Bar Assn. v. Merten, 142 Neb. 780, 7 N. W. 2d 874.

In State ex rel. Nebraska State Bar Assn. v. Bates, *supra*, the court pointed out that the conduct of the respondent in that case continued until July 7, 1948, while the complaint before the Committee on Inquiry was made and filed in November 1954. It appears that in the Bates case a period of a little over 6 years had elapsed. In the instant case the oldest charges appear to be the Molzen divorce action and the action of the respondent relating to the will of Lydia F. Evans. The divorce decree in the Molzen case was entered in 1951, 6 years before the hearing before the Committee on Inquiry. However, the decree of divorce in the Molzen action was modified in 1954. In the Evans will matter the action of the respondent upon which the charge was based was in September 1951. However, the matter was not closed, and the will was contested in the district court and which on appeal to this court resulted in an opinion filed in December 1956.

The respondent complains that Lillian Bentley and Bert Bentley are now deceased. Hearings before the Committee on Inquiry on all the charges against the respondent were held in July and August 1957. Bert Bentley died April 6, 1958. The respondent had the opportunity to cross-examine Bert Bentley at the hearing before the Committee on Inquiry, and that evidence was before the referee pursuant to the stipulation of the parties herein. Lillian Bentley died on February 3, 1958. Dr. C. E. Wiltse died in 1958. The respondent, if he desired, could have taken depositions of the latter two persons mentioned. This matter occurred in 1953.

We conclude that the respondent's defense of laches is without merit.

The respondent contends that he was denied due process of law under Article XIV of the Constitution of the United States and Article I, section 3, of the Constitution of the State of Nebraska. In this connection, the respondent asserts that certain members of the Committee on Inquiry were biased and prejudiced against him, and should have been disqualified from acting on such committee; that the Advisory Committee refused to review this matter; that an investigator, who was duly appointed, solicited complaints against the respondent by interviewing attorneys for that purpose; that the rules governing the hearing before the Committee on Inquiry and the Advisory Committee require secrecy of the proceedings and such rules were violated; and that the respondent made demand of the Committee on Inquiry for documents and papers in the possession of such committee, which the committee refused to produce at such hearing.

The rules creating, controlling, and regulating the Ne-

braska State Bar Association consist of eleven articles. Without setting forth the substance of each and every article, suffice it is to say that a Committee on Inquiry is appointed by the Supreme Court in each district court judicial district of the state, and the Advisory Committee appointed by the Supreme Court consists of one member from each Supreme Court judicial district. From a reading of all the rules creating, controlling, and regulating the Nebraska State Bar Association, it is obvious and very apparent that the only function of the two committees, that is the Committee on Inquiry and the Advisory Committee, is to investigate charges against any attorney to determine whether there is proper cause to believe he has been guilty of unethical and unprofessional conduct and has violated the Canons of Professional Ethics.

Under the Revised Rules of the Supreme Court, Part III, Disciplinary Proceedings, Rule 2 provides: "Proceedings for discipline of attorneys may be instituted and prosecuted in the name of the State of Nebraska on the relation of the Nebraska State Bar Association. * * *."

Rule 3 provides: "Proceedings shall be initiated by the relator filing a verified complaint setting forth the grounds thereof with reasonable definiteness. The complaint shall be filed with the Clerk of the Supreme Court, who shall then docket the cause as an original proceeding in the Supreme Court."

Rule 4 provides in part: "Service upon the respondent may be had by serving upon him a copy of the complaint and notice of the time for answer in the same manner as service of summons is had in civil proceedings in the district courts of the state, * * *."

Rule 7 provides in part: "Upon the filing of an an-

swer raising an issue of fact the court shall refer the matter to a member of the bar as referee. It shall be the duty of such referee to fix an early date for hearing, notify the relator and the respondent or their respective attorneys of record, and without delay to hear such testimony as may be introduced under the pleadings. The referee shall have all powers of a referee in civil actions in the courts of Nebraska. The referee shall observe the rules of evidence applicable in civil actions in the district courts of the State of Nebraska. * * * The referee shall make a written report stating his findings of fact and recommendations. * * * and the referee shall promptly transmit to this court his report, together with such record so certified."

Rule 10 provides: "The court may disbar, suspend, censure or reprimand the respondent and take such other action as shall by the court be deemed appropriate."

It is noted that the rules of the Nebraska State Bar Association and the rules of the Supreme Court, as they relate to disciplinary matters, provide two separate and distinct procedures. The rules of the Nebraska State Bar Association provide for a judicial district Committee on Inquiry and a state Advisory Committee. The procedure therein set forth is primarily for the purpose of conducting an investigation, which investigation may be formal or informal. The purpose of this procedure is to make sure that no unwarranted complaints are filed against attorneys. By this means the charges against attorneys are investigated, and if sufficient facts appear to indicate that he might be guilty of a violation of a Canon of Professional Ethics, or might be subject to disciplinary action on the facts of each individual case, a complaint shall be lodged against him in the Supreme Court of the State of Nebraska.

In Chicago, B. & Q. R. R. Co. v. Headrick, 49 Neb. 286, 68 N. W. 489, this court said: "The term 'due process of law' has been often defined as such an exertion of the powers of government as are sanctioned by the settled maxims of the law and under such safeguards for the protection of individual rights as those safeguards prescribed for the class of cases to which the one in question belongs. (Cooley, Constitutional Limitations, 355.) * * * but is satisfied by a proceeding applicable to the subject-matter and conformable to such general rules as affect all persons alike."

In Reed v. Reed, 70 Neb. 779, 98 N. W. 73, it is said: "Due process of law may be said to be satisfied whenever an opportunity is offered to invoke the equal protection of the law by judicial proceedings appropriate for the purpose and adequate to secure the end and object sought to be attained."

In Ripley v. Godden, 158 Neb. 246, 63 N. W. 2d 151, this court said: "The indispensable elements of due process are a tribunal with jurisdiction, notice of a hearing to the proper party, and an opportunity for a fair hearing according to applicable procedures."

In the instant case the relator has fully complied with these indispensable elements. A complaint was duly filed in the Supreme Court of this state; the respondent had full and complete notice of the same; he was given an opportunity to answer the complaint, which he did at length; the issues were joined; a hearing was had, pursuant to the stipulation of the parties herein, before a referee duly appointed by this court; and evidence was heard on behalf of the relator and on behalf of the respondent. There can be no question, in the light of the

decisions of this court, but that this court has jurisdiction to entertain disciplinary matters against lawyers admitted to the practice of law in this state.

It appears that the respondent primarily predicates denial of due process of law before the Committee on Inquiry and the Advisory Committee of the Nebraska State Bar Association. In the case of In re Sparrow, 333 Mo. 203, 90 S. W. 2d 401, it was pointed out that each state had complete control over the remedy which it offers to suitors in its court. The bar committees were clothed by rule with the power to make investigations and to hold formal hearings. Such investigations and hearings were found to be summary in character and not adversary in any proper sense but were intended to determine whether the facts were supported by credible evidence and whether or not such facts were sufficient to warrant the institution of a proceeding by information to discipline or disbar. The court said: "Subsequent subsections deal with the filing of information, issuance of summons, joinder of issue by answer, trial 'as in extraordinary legal remedies, always saving to each side a reasonable opportunity to present evidence and to be heard.' Thus the rights of confrontation of witnesses and due process of law are plainly and adequately safeguarded. It is plain also that the summary investigations and hearings provided for do not invade or impair any constitutional right of the person whose professional conduct is subject to the preliminary inquiry."

As stated in the case of In re Conner, 357 Mo. 270, 207 S. W. 2d 492: "Procedure in disbarment is seldom uniform, varies widely with the state or Federal jurisdiction in which the action is pending and seldom follows any local code of civil procedure. Generally, the judicial

department of the jurisdiction involved adopts and uses any procedure it deems appropriate to disbarment."

From our research, we have no doubt but that the matters relating to discipline, suspension, reprimand, or disbarment of attorneys practicing before the courts of each state are subject to the rules promulgated for that purpose. It is clear that the preliminary proceedings before the Committee on Inquiry and the Advisory Committee were merely investigating proceedings which neither end in any decree or establish any right. We conclude that the respondent was not denied due process of law in this case. The respondent's contention in such respect is without merit.

We have herein set forth certain of the charges against the respondent made by the relator in the complaint. We have carefully reviewed the record as it relates to all of the charges set forth in the complaint. The record shows that the respondent has failed to demonstrate loyalty and fidelity to his clients and to meet the trust placed in him by them. In addition, in the practice of his profession he has not shown fairness and candor in his dealing with other lawyers, and has not dealt candidly with the facts in cases handled by him. It is also apparent from the record that the respondent has failed to uphold the honor and dignity of the legal profession.

The respondent has been actively engaged in the practice of law in this state for 28 years, with a rather large and extensive practice. Due to such practice, he should have been, and obviously was, well aware of the Canons of Professional Ethics which controlled his conduct while engaged in the practice of law. In view of the facts herein set forth, and all of the circumstances disclosed by the record relating thereto, we find that the ends of

justice will be properly served by suspending the respondent from the further practice of law for a period of 1 year, the same to go into effect when our judgment rendered herein becomes effective. If, at the end of 1 year from the effective date of his suspension, respondent makes an affirmative showing sufficient to satisfy this court that he has fully complied with our order of suspension and that he will not, in the future, engage in any practice offensive to the legal profession then he will be reinstated and allowed to engage in the practice of law. In the event he fails to comply with the order as heretofore set forth, the suspension provided herein shall become permanent.

Judgment of suspension accordingly. All costs of this proceeding are taxed to the respondent.

JUDGMENT OF SUSPENSION.

APPENDIX 5

HOW AND WHERE FEDERAL QUESTIONS WERE RAISED

Statement of Contents

The following is a chronological summary of proceedings before the Committee on Inquiry, the Advisory Committee, the Referee, and the Supreme Court of Nebraska. It will show by reference and summary the manner and method in which the Federal Questions sought to be decided were raised and the way they were passed on by the Court, or Committees, with specific reference to places in the record, where the matter appears. The chronological order forms itself to the following:

I) Matters raised prior to any hearing before any Committee.

2) Matters raised before the Committee on Inquiry.

3) Matters raised before the Advisory Committee.

4) Matters raised before the Referee.

5) Matters raised before the Supreme Court of Nebraska.

6) Matters raised by motion for rehearing after the decision of the Supreme Court of Nebraska.

Matters Raised Before the Committee on Inquiry Hearing

Exhibit 67, page 2407, letter of Kenneth H. Dryden, Attorney, to George Turner, Clerk of Supreme Court and Secretary of the Nebraska State Bar Association, dated June 28, 1957. Dryden, who is law partner of Jensen and attorney of record, called attention to the Clerk of the Supreme Court, George Turner, that two of the members of the Committee on Inquiry were disqualified. He stated that Nye had been antagonistic to him in the last three years and offered to be more specific as to his disqualification; as to Randall, the question involving client of his, whom he had consulted, was raised. The Clerk was advised:

"You can put this down as an official protest."

The record contains no response to this letter.

Matters Raised Before the Committee on Inquiry

In Exhibit 5, Volume 10, page 1222, lines 14 to 20, Jensen asked that Randall disqualify himself on the Committee. In Exhibit 5, Volume 10, page 1223, line 22 and page 1225, line 6, Jensen objected again to Randall not disqualifying himself, referred to documents, which were on file and which Randall agreed to give him copies and refers to letter from Randall, refusing to produce docu-

ments, which were on file on the ground they were privileged. Randall admits he would not give up copies of the letters, on the ground they were privileged, and admits there were letters and papers in the file. Jensen made the statement that he wanted the record to show that there were letters on file which were not shown to him because they were privileged.

In Exhibit 5, Volume 10, page 1260, line 22, page 1262, line 10, Jensen again asked Randall to disqualify himself, because he was a member of the Normal Board of the College who hired Blue. Jensen asked the right to have this taken up and secure a ruling on this matter. This was overruled by Committee member, Mr. Nye, at exhibit 5, Volume 10, page 1262, line 25 to 1265 line 3. In Exhibit 5, Volume 10, pg. 1263, lines 17 to 1264, line 18, Jensen again objected to Mr. Randall who drew this complaint and filed it with himself and asked permission to take the matter of his disqualification up with the Advisory Committee. Jensen also asked the record to show that he came to Randall's office before the hearing, was shown various documents and letters and subsequently thereto, was refused access to the same. Jensen again raises disqualification, on the basis of prejudice, against Randall, at Volume 10, Exhibit 5, page 1265, lines 6 to 11. At Volume 10, page 1265, Exhibit 5, lines 19 to line 1, Jensen was overruled again on this motion for disqualification. Jensen then asked leave to present this to the Advisory Committee. Volume 10, exhibit 5, page 1267, line 2 to page 1270, line 24, Jensen asked that the record show that there were letters which he wanted in the hands of the Committee and that he had been refused access, demanded they be presented and he described the letters to some extent. Objection to this was sustained. Offer was made of proof describing certain of the letters and demanding

that they be produced, and a Committee member admitted he saw copies of the letters, states that he didn't know what other letters were in the file, that he conferred with Mr. Connors, the investigator, and all ruled they were privileged communications. Jensen offered in evidence a letter from Randall, the Chairman of the Committee, in which Randall stated the letters and matters in the file were privileged communications. Jensen challenged the impartiality of Connors, the investigator, stating that he had gone to law firms without any specific complaint in mind, asking for and soliciting complaints to be filed against Jensen, Volume 10, Exhibit 5, page 1271, lines 1 to 10, Nye overruled Jensen's motions again and made specific findings that Randall and Connors were not disqualified. At page 1272, Mr. Nye, member of the Committee on Inquiry ruled:

> "This Committee is not a Judicial Committee, it is more like a grand jury investigation, if we find there is probable cause, we find what a grand jury would determine as an indictment."

Once more Jensen was overruled in his objections to the Committee and he requested that the matter be submitted to the Advisory Committee before proceeding. In Volume 10, Exhibit 5, page 1480, lines 9 to 13, Jensen objected to the introduction of exhibit 22, being the entire proceedings in the *Evans* Will case, except as to portions of evidence given by Jensen himself in the case.

Matters Raised Before the Advisory Committee

A petition was filed by Jensen after the hearing before the Committee on Inquiry, before the Advisory Committee, which appears in Volume 17, Exhibit 68, page 2410. The petition refers to the letter of Kenneth H. Dryden, to the Clerk of the Supreme Court, George Turner, pro-

testing and challenging the qualifications of Randall and Nye to serve on the Committee on Inquiry, which has heretofore been referred to as exhibit 7, page 2407. Letter of Kenneth H. Dryden to George Turner, dated June 28, 1957. Further in his petition, Jensen alleges he made appearance before the Committee on July 18, 1957, challenged the qualifications of Randall and others on the Committee, on the grounds of prejudice or disqualification by virtue of Nye representing and consulting with Mrs. Molzen and stating that all motions of Jensen were overruled by the Committee on Inquiry. Jensen, in his petition to the Advisory Committee, also challenged Connors, the Investigator, who conducted the hearing before the Committee, alleging he had gone to other law offices not for the purpose of investigating any specific charge but for the general purpose of soliciting complaints. That Connors had made statements to Molzen that the matter would eventually reach the Supreme Court by way of the Complaint. That further Connors had violated secrecy of these matters by telling outside people that there were six charges against Respondent. Jensen further challenged the matter of the refusal of the Chairman of the Committee to permit Jensen to inspect letters and exhibits in his possession and alleged that Jensen had, repeatedly, during the hearing, demanded inspection and production of these documents, which was refused. Jensen further challenged the refusal of the Committee to accept competent, relevant and material testimony offered by him before the Committee and the hearing there, and further challenged the right of Connors to bring numerous people to the hearing before the committee, allowing them to sit in an open room, next to the hearing room, with the transom open, so they could hear all proceedings against Respondent, thus violating secrecy rules of the Nebraska Bar Association. The petition further challenged the accumu-

lation of the charges, the leaking of information, the wrongful conduct of the proceedings, "in a manner that deprived Respondent of rights guaranteed him by the Constitution of the United States." Jensen alleged that he was wrongfully denied the right to inspect and offer in evidence, documents which the committee had before them and demanded of the Committee on Inquiry that they produce copies of all charges, copies of investigation and reports and correspondence, monthly reports and all reports now in the possession of the Advisory Committee. In said petition, Jensen, the Respondent, challenged the complaints as being false and contrary to the evidence. That none of the complaints had merit or were valid and stated:

> "Respondent has been deprived of and denied rights guaranteed to him by the Constitution of the United States, including and not restricted to the following: (a) the right to know the names of his accusers: (b) the right to see the charges made against him; (c) the right to inspect documents in the possession of the committee and its investigator; (d) the right to a fair and impartial hearing before an unbiased and unprejudiced tribunal; (e) the right to due process of law."

Exhibit 70, Vol. 17, page 244, a letter from the Advisory Committee of the Nebraska State Bar Association, to Votava, Paine and Dryden, Attorneys for Defendant states:

> "The members of the Committee have examined the petition which you filed on October 24, 1957 and have ruled that the hearing will be restricted to the merits of the charges and complaint * * * and that arguments will be heard on the merits but not as to the disqualification of the members of the Committee on Inquiry, their method of hearing, or other procedural matters."

Matters Raised Before the Referee

At page 10 of the Record before the Referee, Respond-

ent moved to dismiss proceedings for the reason the Committee on Inquiry had prejudged the case and therefore any proceedings were void ab initio, and moved to dismiss the proceedings for the reasons the members of the Committee on Inquiry were biased and prejudiced and proceedings were void ab initio and moved to dismiss the action for the reason the Advisory Committee considered evidence and testimony before it outside the presence of Respondent, being one Edward J. Baburek. Further moved to dismiss the proceedings for the reason they were void because most of the Committee on Inquiry and Advisory Committee considered documents and evidence not in the record nor made available to Respondent. Jensen further moved to dismiss for the reason the rules of the Nebraska Bar Association and the Supreme Court of the State of Nebraska were violated and established procedures were not followed in proceedings heretofore conducted in the matter; that Respondent had been ied a fair trial in the proceedings heretofore had; that the actions taken by the Committee on Inquiry and Advisory Committee were arbitrary and capricious; that this Court had no jurisdiction and all proceedings having taken place theretofore were void and Respondent's right of due process had been violated. All of such motions were overruled. Motion was also made for inspection of all charges and complaints together with all papers and documents considered by either the Committee on Inquiry or the Advisory Committee and to require the production of all reports, correspondence, memorandum, etc. used by the Investigator, Harold Connors. These motions also were overruled by the Referee. The record shows, at page 208, line 24, that exhibit 5 was offered in evidence by the State, which was a transcript of evidence, taken before the Committee on Inquiry on the 18th day of July, 1957 and on the 6th day of August, 1957. Objection was made to

this by Mr. Votava, at page 209 of the Record and Jensen himself, made objection to the blanket offer on the ground that the offer as made would deprive him of his right to object to each and every piece of evidence and each of every witness on the ground of relevancy, competency and materiality. This was overruled by the Court on page 212, line 17, and the entire exhibit was received in evidence at page 213, line 1. During the course of the trial, at page 303, line 12, Respondent himself withdrew objections to any part of the proceedings which were offered by him before the Committee on Inquiry contained in exhibit 5 of the evidence and all exhibits and evidence offered by Respondent, stating:

> "This includes all evidence offered on behalf of Respondent in said proceedings in exhibit 5."

As stated by Respondent, it referred only to Respondent's evidence, and any exhibit offered by him. Line 23, page 303. At this time, the State's attorney advised the Court that the withdrawal of objections to portions of the exhibits Nos. 2, 3, and 5, previously received in evidence was made independently by the Respondent and that the State stood on its original offer of the exhibits that were received in evidence, page 306, line 23.

At the close of all evidence of the State as appears at page 247, line 1, of the record, all motions made at the beginning of the trial were renewed and overruled. Further motion was made that the entire proceedings be dismissed for the reason there was no case and there was no evidence to support any of the charges contained in the various paragraphs of the complaint, which motion was overruled.

At page 784, at the close of all the evidence in the case, the motions were renewed to dismiss for the reason that

there was no evidence that Respondent had committed any offense or offenses and was innocent of all wrong doing and repeated severally all the series of motions made at the beginning of the hearing, which were overruled by the Court. Motions were made at page 9, line 16, to dismiss the *Evans* matter on the ground of laches for the reason that Mrs. Evans died prior to any notice being given to Respondent in connection with the matter and that all other complaints were barred by laches, which motions were overruled. Referee's Report, which is attached as Appendix No. 3 to this petition, find,

> "Respondent's defense of laches is without merit."

He also finds as far as due process of law is concerned,

> "Respondent has not been deprived of due process of law."

He also finds,

> "The proceedings before these committees were only preliminary and investigative in their nature and these committees had no authority to adjudicate the issues and exercised none. This case did not become an original action, until the complaint was filed with the Clerk of this Court."

Jensen, Respondent, excepted to all the Referee's findings on Laches at paragraphs 1 and 4 at page 26 and further excepted to the Referee's error in failing to find the rights of Respondent had been violated under the rules of due process and in failing to find Respondent's constitutionally guaranteed right of due process had been violated because the two members on the committee were biased and prejudiced and personally interested; in failing to find that Respondent had made timely objections to the qualifications of the members of the Board of Inquiry, both to the Supreme Court of the State of Nebraska, and the Advisory Committee and to the Board of Inquiry it-

self, and that the Respondent's constitutionally guaranteed right of due process was violated because members of the Committee on Inquiry had prejudged the matter, and because the members of the Advisory committee had considered evidence and testimony outside the presence of Respondent, and that the Committee on Inquiry had considered documents and records denied Respondent for inspection; that the Advisory Committee had considered documents and records and heard evidence and testimony outside of the Record, to which Respondent was denied the right of inspection; that the Committees had failed to permit Respondent access and right of inspection to documents in their possession, after proper and prompt demand had been made; that the rules of the Supreme Court of the State that had been dealing with disciplinary matters in the State had been actually and repeatedly violated; that the Referee had erred in failing to find that rights of Respondent to due process had been violated because of failure to observe and follow rules of evidence applicable to civil actions; that the Referee erred in failing to find that Respondent had been denied due process because of elimination of one of the members of the committee and replacing him by an interested and disqualified alternate member; that Respondent's right to due process had been violated by the Referee failing to find that Respondent's rights had been violated by investigatory bodies, who failed to follow judicial rules and failed to comply with the rules of civil procedure and excepted generally to all the acts of the Board of Inquiry, the Investigating officer and the Advisory Board and the Referee, which constituted a violation of Respondent's rights under due process. Objection was made in the exception to the Referee admitting irrelevant, incompetent and immaterial evidence over objection, in failing to grant a continuance until Connors, the Investigating officer, had

been required to answer questions propounded to him and that the Referee failed to require productions of all documents for Respondent which were available for consideration by the various committees and officers, and because of the failure to dismiss because the Board of Inquiry had prejudged the matter and in failing to dismiss the proceeding because the Advisory Committee had considered unsworn evidence; that Respondent had not been granted a fair trial and had been denied constitutionally guaranteed rights of due process; that the Referee failed to follow rules of civil procedure in the application of evidence unfavorable to Respondent, made findings based on unsworn statements, contrary to sworn statements of the same persons testifying and in general failing to find that Respondent was innocent and there was no clear preponderance of evidence finding him guilty of any offense whatsoever.

Matters Raised Before the Supreme Court of the State of Nebraska

Transcript on file before this court shows that on July 3, 1958, a Motion was filed by Respondent asking that the paragraphs of the complaint be made more definite and certain, by setting out what canons of ethics Respondent had been guilty of as to each of the complaints, which motion was summarily overruled by the Court on the same date as it was filed. The answer of Respondent, included in the transcript before this Court, and dated November 3, 1958, in paragraph 2 and in paragraph 10 allege that Respondent has been denied due process of law as guaranteed him in the Fourteenth Amendment to the Constitution of the United States of America; that the original Committee on Inquiry was prejudiced, unfair and partial and disqualified; that timely objections had been made

to the Secretary of the Nebraska State Bar Association and before the Advisory Committee and attached a copy of the petition to the Advisory Committee; that Respondent had been denied protection of the Rules of the Supreme Court requiring the proceedings to be handled as a civil action; that Respondent had made demands repeatedly to the Committee on Inquiry and the Advisory Committee for inspection, copies of charges and complaints and documents which had been refused him; that the charges were barred by laches; that the investigator had solicited complaints to be filed against Respondent and gave information to unauthorized persons that charges were to be filed; that Respondent's rights were denied by disseminating wrongful information concerning the proceedings; that he was denied due process of law by prejudicial activities of the Committees; that the Chairman of the Committee on Inquiry was disqualified by representation of parties who complaint was on file before the Committee.

The Respondent's brief filed with the Nebraska court after the decision of the Referee, in "Statement of Questions Involved," raises the questions concerning findings of fact and conclusions of law of the Referee, outside the pleaded issues of the case; alleges that the allegations of the complaint were so vague and indefinite as to amount to a denial of constitutional rights; that the findings of fact and conclusions of law of the Referee were not supported by the evidence; that the exceptions filed to the Referee's report should be sustained that Respondent was entitled to dismissal of every count set forth in the complaint; that the failure of the Committees to comply with the rules and procedure, and in denying Respondent's motions to disqualify substituting members of the committee, refusing inspection of documents, refusing to disclosure by paid investigator, considering evidence

outside the record, prejudging the case, making findings upon which there was no evidence, refusing to consider evidence of Jensen and for all other reasons set forth in the pleadings and motions and objections to Jensen:

> "were a denial of due process and his constitutional rights so as to deprive this Court of Jurisdiction to enter any order other than a dismissal of the complaints."

The Assignment of Errors in the brief of Respondent, raise issues of the findings of fact of the Referee being contrary to law and to the evidence, and as to the overruling by the Referee, of Jensen's motion for continuance and as to the failure of Referee require Connors, Investigator, to answer questions put to him; and the further issue that the Referee erred by virtue of each item listed in the 192 Exceptions to his report and in not finding for Jensen on each and every count and in not finding that the Counts were all barred by laches, and in not finding that the members of the Committee of Inquiry were barred from participating by reason of personal interest, and in making findings of fact and conclusions of law outside the issues and the record, and in finding that mere intention to execute an unprofessional act is sufficient to merit disciplinary action, and in not finding that in the proceeding the essential rules and processes and procedures of law were not followed, and in not finding that Respondent's constitutional rights to due process were violated in the proceeding in each of the ways set forth in the brief, and in failing to receive certain evidence offered by Jensen and by making errors of law.

Proposition No. 2 of "The Propositions of Law," set forth in the brief of Respondent, raised the matter of due process, and equal protection under clauses of the Constitution.

Proposition of Law No. 5 stated the rule that only matters which are charged in a complaint should be considered. Proposition No. 20 stated the Rule that the essence of due process is fair play. Proposition No. 21 stated the rule that the investigation and trial of a lawyer for professional conduct is a judicial proceeding and must follow established rules. Proposition of Law No. 22 stated that due process requires that officers acting in quasi judicial capacity be disqualified for interest, bias, or prejudice.

Proposition of Law No. 23 asserted that prejudgment of judicial matter renders the decision void. Proposition No. 24 asserted that unsworn evidence, outside the presence of Jensen and not subject to his cross-examination renders the proceedings void. Proposition No. 25 asserted that Jensen was denied due process when the Committee on Inquiry and the Advisory Committee considered ex parte documents and evidence and refused Jensen the right to examine the same. Proposition No. 26 stated the rule that due process requires that the essential processes, rules and procedures of law are not to be disregarded. Proposition No. 27 asserted that due process was violated by findings which were not sustained by the record and of which there is no evidence.

After the decision of the Supreme Court, handed down October 14, 1960, a Motion for Rehearing was filed, which is a printed brief under the rules of the Court. The Motion for Rehearing raised questions as to violation of the 14th Amendment to the Constitution of the United States that Respondent's right to practice is a property right and asserted that the judgment of the Supreme Court deprived Respondent of his property and his liberty and abridged his privileges and immunities without due process of law, and that the Court ignored Jensen's proper de-

fense in the *Evans* matter; that the judgment was in violation of the Constitutional Guarantees of Respondent in denying procedural due process of law, according to the rules and regulations of the Court; and that the Judgment denied Respondent his constitutional safeguards and rights under the rules and procedure promulgated by the Court.

The "Statement of Questions Involved," in the Motion for Rehearing brief, again raised the matter of the conviction of Jensen of offenses where there was no evidence to support such conviction and raised the question as to whether, where offenses are not pleaded, was it proper to convict on non-pleaded offenses; and raised the question of the due process as to proceedings before the Committees on Inquiry and before the Advisory Committee and before the Referee; and raised the question of using testimony at former trials, objected to, without regard to errors of law, occurring in their admission; and raised the question of the court creating new offenses not previously held to be offenses in any court. The propositions of law again raised the matter of the indefiniteness and the vagueness of the complaints, the violation of due process in convicting an attorney where there was no evidence to sustain the conviction, and cited authorities to the effect that the requirements and essentials of due process apply to summary and investigatory procedures and stated:

> "An attorney cannot be deprived of his right to practice except by proceedings that guarantee to him all of the essentials of due process."

Reference is made to the briefs, copies of which are on file with the Supreme Court of Nebraska, and which are part of the records in this case.

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MAR 20 1961
JAMES R. BROWNING, Clerk

In The

Supreme Court of the United States

October Term, 1960

No. 745

JOHN P. JENSEN, PETITIONER,

V.

STATE OF NEBRASKA; EX REL. NEBRASKA STATE BAR ASSOCIATION, RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

CLARENCE A. H. MEYER,
Attorney General, State of Nebraska,
Capitol Building, Lincoln, Nebraska,

GERALD S. VITAMVAS,
Deputy Attorney General, State of Nebraska,
Capitol Building, Lincoln, Nebraska,
Counsel for Respondent.

JOE CHRISTENSEN PRINTING, 1521 O Street, Lincoln 8, Nebr.

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In The

Supreme Court of the United States

October Term, 1960

No. ———

JOHN P. JENSEN, PETITIONER,

V.

STATE OF NEBRASKA, EX REL. NEBRASKA STATE BAR ASSOCIATION, RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

NATURE OF THE CASE

This cause is before this Court on the petition of John P. Jensen for a writ of certiorari to the Supreme Court of Nebraska. This action arose as an original action in the Supreme Court of Nebraska as a disciplinary action against the said John P. Jensen. The Supreme Court of Nebraska found that Jensen's actions in five separate instances violated his duties as an attorney. The petitioner is seeking a writ of certiorari

from this Court on the basis that he was denied due process of law in the State Supreme Court.

STATEMENT OF THE QUESTION INVOLVED

The question at this time is whether this Court should grant or refuse the petition for a writ of certiorari. The position of the respondent is that there is no substantial question of due process involved in this matter.

ARGUMENT

The granting of a writ of certiorari is a matter of grace and writs of certiorari are granted or refused within the sound discretion of this Court. *The Philadelphia and Reading Coal and Iron Co.* v. *Gilbert*, 38 S. Ct. 58, 245 U. S. 162, 62 L. ed. 221, dismiss error. *Gilbert* v. *Philadelphia and Reading Coal and Iron Co.*, 162 N. Y. S. 1121, 176 App. Div. 889; *Wade* v. *Mayo*, 68 S. Ct. 1270, 334 U. S. 672, 92 L. ed. 1647. The petitioner's allegations of a violation of due process go to almost every step of the proceedings in the Nebraska Supreme Court. In general his allegations may be divided into three broad groupings. (1) The preliminary investigation, (2) The allegations of the complaint, and (3) The trial proceedings.

I.

The Preliminary Procedures Before the State Bar Committees Are Merely Investigatory and No Determination of the Rights of Petitioner Were Made. But Were For the Purpose of Determining Whether or Not Formal Charges Should Be Filed.

The petitioner has complained at length of the procedure which was followed before the Committee on

Inquiry and the State Advisory Committee of the Nebraska State Bar Association in this matter. In brief questions 3, 4, 6 and 8 presented by the petitioner as appearing in his petition for certiorari on pages 2, 3 and 4 thereof would appear to fall in this first category. In disciplinary matters in Nebraska there are two separate procedures contemplated. The first is the procedure before the Bar Committees to determine whether or not a formal complaint should be filed. On the filing of a complaint the matter is then prosecuted in the Supreme Court of Nebraska. We have attached as Appendix 1 a copy of a portion of the Rules of the Supreme Court of Nebraska which govern disciplinary proceedings in that Court. It should be noted that Rule 1 provides that proceedings for discipline of attorneys are to be considered civil in their nature and for the purpose of protecting the public and the good name of the members of the Bar. Rule 2 provides that proceedings for the discipline of attorneys may be prosecuted in the name of the State of Nebraska on the relation of the Nebraska State Bar Association or on the relation of a private person if leave of court be first obtained. Leave may be granted to a private person under the rule only if the matter has been submitted to a committee of the Nebraska State Bar Association and refused by the State Advisory Committee. Rule 3 sets forth the requirements for a complaint in such an action providing that the grounds thereof be set forth with reasonable definiteness. The rules provide for service of the complaint and provide that the respondent shall have time to answer (Rule 5). Rule 7 provides that when an answer raises an issue of fact that the matter shall be referred to a referee. At the hearing before the referee a full trial is anticipated.

The referee makes his report direct to the Supreme Court on the evidence which has been adduced at the hearing before him. Rule 8 provides for the filing of exception to the report of the referee. Rule 9 contemplates the filing of briefs by the parties to the disciplinary action and argument by the counsel before the Supreme Court.

The petitioner's complaint against the proceedings before the Inquiry Committee and Advisory Committee were directed to qualifications of the members of the Committees and the alleged failure of the Committee on Inquiry and Advisory Committee to follow the procedures set forth in the rules appearing in Appendix 1 on page 46 of his petition. The respondent submits, admitting the truth of the petitioner's allegations of these facts only for the sake of this argument, that the procedures before the Committee on Inquiry and the State Advisory Committee were merely investigative in nature and that respondent's allegations of due process are not applicable to this situation. As pointed out by the Nebraska Supreme Court in its opinion in this matter as appearing in Appendix 4 of the petitioner's petition, pages 96, 99, each state has complete control over the remedy which it offers to suitors in its courts. The Bar Committees are clothed by rules with power to make investigations and to hold hearings in order to determine whether the facts are supported by creditable evidence and whether or not such facts are sufficient to warrant the institution of a proceeding to discipline or disbar an attorney. The preliminary proceedings before the Advisory Committee and the Committee on Inquiry are merely investigating procedures which do not end in any decree nor establish any right This, in effect, is the holding of the

Nebraska Supreme Court in this matter and as to the nature of these committees we submit that this holding is not one that is reviewable by the Supreme Court of the United States. It is submitted that the State Supreme Court's finding in this respect is proper and binding. *Wade* v. *Mayo*, 68 S. Ct. 1270, 334 U. S. 672, 92 L. ed. 1647. The Court of course has pointed out that due process is an illusive concept, that its exact boundaries are undefinable and its content varies according to specific factual contexts. However, this Court has also held that in investigative procedures that some of the guarantees of the Constitution of the United States may be dispensed with without violating due process of law. *Hannah* v. *Larche*, 80 S. Ct. 1502, 363 U. S. 420, 4 L. ed. 2d 1307. *Anonymous Nos. 6 and 7* v. *Baker*, 79 S. Ct. 1157, 360 U. S. 287, 3 L. ed. 2d 1234.

II.

Petitioner's Allegations that the Complaint Did Not State the Ground For the Disciplinary Action and that He Was Disciplined For Charges Not Made Are Not Supported By the Record.

The petitioner further contends in his petition for a writ of certiorari that, in effect, he was suspended from the practice of law on grounds which were never pleaded and on which the attorney had no knowledge or notice until after completion of his hearing before the Court appointed referee. This charge directly attacks the complaint and the pleadings. It is submitted that this argument, advanced by the petitioner herein, is wholly without merit. As pointed out in the opinion of the Court charges must be brought against a respondent before a hearing can be had. The rules of

the Court further provide the nature that these charges shall take. As pointed out earlier Rule 3 of the rules governing disciplinary proceedings provides that the complaint shall set forth the grounds thereof with reasonable definiteness. The complaint in each of the five instances adequately pleaded facts to show the unethical conduct of the petitioner herein. The question of whether the alleged acts were ethical is one for the determination of the Court and the legal effect of the acts need not be pleaded. The State does not accept the petitioner's version of the legal effect of the pleadings in this matter. It is submitted that the complaint and the pleadings clearly set forth the basis of the charges and clearly establish the matters on which this action was based.

III.

Petitioner's Allegations that There Was No Evidence In the Record to Support the Charges of Which He Was Found Guilty; that There Was Fundamental Unfairness In the Use of Evidence and that He Has Been Denied Due Process Are Not Supported By the Record.

The final area in which the petitioner seeks his writ of certiorari is in the proceedings before the referee and the Court. The respondent infers that there is no evidence in the record that he committed the offenses with which he was charged and of which he was found guilty. He also asserts that there was fundamental unfairness in the use of evidence in this matter. With respect to the first argument advanced by the petitioner it seems clear that there is more than sufficient evidence to show the reprehensible conduct on the part of the petitioner in each of the five instances. It may

be that were we to accept the petitioner's version and interpretation of the facts as being correct, that the evidence might be insufficient to support a finding of wrongdoing. However, the evidence in this matter was considered by the referee, his findings reviewed by the Supreme Court of Nebraska and the findings of fact were against the petitioner. There is clearly adequate evidence in the record to support these findings. It is further submitted to the Court that technicalities may not be invoked to defeat the charges where undisputed facts show conduct which is ethically wrong. *In re Becker*, 16 Ill. 2d 488, 158 N. E. 2d 753; *Braverman* v. *Bar Association of Baltimore City*, 209 Md. 328, 121 A. 2d 473. Certiorari denied 352 U. S. 830, 1 L. ed. 2d 51, 77 S. Ct. 44. With reference to the allegations of the petitioner that there was fundamental unfairness in the use of the evidence we wish to point out to the Court that there were no charges made of the State using perjured testimony or that the State coerced a confession from the petitioner herein. It is further submitted that considering the evidence adduced by the petitioner himself in this matter that the charges were sustained and the true character of the actions committed by the petitioner are brought to light. The petitioner's admitted actions are clearly sufficient to subject him to the penalty which he suffered.

However, the petitioner rests his criticism as to the use of evidence toward the admission of a Bill of Exceptions in a matter entitled, *In re Estate of Evans*, (Ex. 2 Supplemental Volume), it might be pointed out to the Court that this case involved the matter of prior testimony wherein the petitioner, John P. Jensen, was a party to the action. This was offered for considera-

tion of the Committee on Inquiry. It might be pointed out to the Court that this evidence as well as the Transcript of Testimony before the Committee on Inquiry (Ex. 5, Supplemental Volume) was offered in evidence before the referee. The petitioner at the hearing before the referee made objections to the admission of both of these documents. However the stipulation appears in the record which the State contends made it proper for such proceedings. This stipulation is included as Appendix 2 hereof. This of course is an evidentiary question. The Supreme Court of Nebraska found that in view of this stipulation and in view of the fact that, as to both the Bill of Exceptions in the *Evans* case and the Transcript of Testimony before the Committee on Inquiry, the petitioner withdrew any objection as to those parts of both of such records that were favorable to him that such were properly received. The Court further found that he had not properly preserved his objections as to the balance of these exhibits. It is difficult to see on what basis the petitioner asserts that due process was violated because of this ruling of the Court.

IV.

The Granting of a Writ of Certiorari Should Be Refused as No Substantial Federal Question Is Involved.

The State contends that no substantial Federal question is involved in this matter. The matter originally started before the Committee on Inquiry and a lengthy hearing was held before this Committee on two different dates. The hearing before the Committee on Inquiry started on July 5, 1957, and was held again on

August 6, 1957, (Ex. 5, Supplemental Volume). The petitioner was personally present and was permitted to examine and cross-examine witnesses. Subsequently the matter was considered by the Advisory Committee of the Nebraska State Bar Association on May 23, 1958, (Ex. 33, Supplemental Volume: introduced into evidence by the petitioner herein, Transcript of Testimony, p. 307). This record shows that the petitioner was advised that this Committee would consider any proper evidence which had been offered and excluded before the Committee on Inquiry. It was determined that a complaint should be filed and on June 16, 1958, a complaint was filed in the Supreme Court of the State of Nebraska.

The petitioner does not contend that he did not receive notice of the complaint. The record is clear that he did. It was also stipulated on December 5, 1958, that the matter be heard by the referee on April 20, 1959, and pursuant to this stipulation the hearing was held commencing on that date. The hearing lasted for five days. The Transcript of Testimony consists of some 780 pages and 78 exhibits. The referee and the Supreme Court of Nebraska found that the facts were against the petitioner. The record clearly shows that the allegations are without merit.

CONCLUSION

In conclusion it is submitted that Nebraska law in disciplinary actions contemplates a complaint with notice and hearing by the Supreme Court of Nebraska before a lawyer may be suspended or disbarred. This proceeding is separate and distinct from any procedures by the Committees of the State Bar Association.

This eliminates the petitioner's allegations as to his treatment before the Committee on Inquiry even if his contentions were sustained by the record. Nor are any of his contentions sustained by the record, but on the contrary the record shows that he was afforded "due process". The granting of a writ of certiorari in this matter should be refused.

Respectfully submitted,

STATE OF NEBRASKA, EX REL.
NEBRASKA STATE BAR
ASSOCIATION, RESPONDENT.

BY: CLARENCE A. H. MEYER,
Attorney General, State
of Nebraska,

GERALD S. VITAMVAS,
Deputy Attorney General,
State of Nebraska,
Its Attorneys.

APPENDIX 1

RULES OF THE SUPREME COURT

DISCIPLINARY PROCEEDINGS

1. **Nature of Proceedings; Purpose.** Proceedings for discipline of attorneys shall be considered civil in their nature, and for the purpose of protecting the public and the good name of the members of the bar of the State of Nebraska. They may be instituted against any person who has been licensed to practice in the courts of the State of Nebraska.

2. **Institution of Proceedings; How Entitled; Who may Bring; Leave of Court Required.** Proceedings for discipline of attorneys may be instituted and prosecuted in the name of the State of Nebraska on the relation of the Nebraska State Bar Association, or on the relation of any other person, if leave of court be first obtained. Leave may be granted to a private person to file proceedings as relator only upon a prima facie showing of probable grounds for disciplinary measures, and only after the matter has been submitted to the appropriate Committee of Inquiry, and reviewed by the Advisory Committee. Proceedings may also be instituted by order of the Supreme Court.

3. **Institution of Proceedings; Complaint; Docketing of Cause.** Proceedings shall be initiated by the relator filing a verified complaint setting forth the grounds thereof with reasonable definiteness. The complaint shall be filed with the Clerk of the Supreme Court, who shall then docket the cause as an original proceeding in the Supreme Court.

4. **Service and Proof of Service; Manner; Registered Mail; Publication of Notice; Contents.** Service upon the respondent may be had by serving upon him a copy of the complaint and notice of the time for answer in the same manner as service of summons is had in civil proceedings in the district courts of the state, in which case it shall be proved by the official return of the officer making such service. Service shall be deemed to have been waived if the respondent shall sign a written receipt for a copy of the complaint and notice. Service may likewise be had by the mailing by the clerk of this court of a certified copy of said complaint and notice by registered mail to the respondent at his last known address; and in that event the official return card of the United States mail, signed by the respondent, acknowledging receipt of the envelope containing the copy of said complaint and notice, shall be deemed sufficient proof of service. In the event that it shall appear by affidavit that personal service cannot be had upon the respondent and that letters to the respondent's last known address are returned unclaimed, service may be had upon the respondent by publication of notice four successive weeks in some legal newspaper published in the county wherein the respondent last resided. Such notice shall state that complaint for disciplinary action has been filed in the Supreme Court of Nebraska against the respondent and shall give the date of filing and the time within which respondent is required to answer.

5. **Answer; Time of Filing; Extension.** The answer of the respondent shall be filed within 20 days after service of notice and a copy of the complaint, or within 20 days after service by publication, as hereinbefore provided, shall have been completed. For cause shown the court may extend the time to answer.

7. **Reference; Taking of Testimony; Report of Referee.** Upon the filing of an answer raising an issue of fact the court shall refer the matter to a member of the bar as referee. It shall be the duty of such referee to fix an early date for hearing, notify the relator and the respondent or their respective attorneys of record, and without delay to hear such testimony as may be introduced under the pleadings. The referee shall have all powers of a referee in civil actions in the courts of Nebraska. The referee shall observe the rules of evidence applicable in civil actions in the district courts of the State of Nebraska. He shall have a competent shorthand reporter present who shall take in shorthand and transcribe in typewriting all oral evidence adduced at the hearing had before the referee. The referee may continue the hearing from time to time as circumstances may require, but shall not delay his proceedings unless justice and equity so require.

The referee shall make a written report stating his findings of fact and recommendations. The typewritten record of the proceedings shall have attached to it all of the exhibits offered at the hearing, and shall be certified by the referee; and the referee shall promptly transmit to this court his report, together with such record so certified.

Upon the filing of an answer raising an issue of law only, the court may in its discretion refer the matter to a member of the bar as referee for such service in relation thereto as the court may by its order of reference direct.

8. **Motion for Final Judgment; Exceptions to Report.** Within 10 days after the filing of such report, either

party may file written exceptions to such report. If no exceptions are filed, the court in its discretion may consider the findings final and conclusive, and on motion shall enter such order as the evidence and law require.

9. **Briefs; Time of Filing and Service; Hearing of Case.** If exceptions be filed to the findings or report of the referee, printed briefs and arguments shall be filed and oral arguments made in the Supreme Court as required by the rules of this court in civil cases. The party filing exceptions to the findings and report of the referee shall serve and file his brief within 30 days after the filing of such report and the brief of the adverse party shall be served and filed within 30 days thereafter. The case shall thereupon be placed upon the Call for hearing.

10. **Disposition of Case; Orders.** The court may disbar, suspend, censure or reprimand the respondent and take such other action as shall by the court be deemed appropriate.

11. **Motions for Rehearing; Time of Filing.** Either relator or respondent may file a printed motion for rehearing at any time within twenty days from the filing of the opinion or rendition of the judgment of the court.

APPENDIX 2

IN THE SUPREME COURT OF NEBRASKA

STATE, EX REL. NEBRASKA STATE BAR ASSOCIATION,	)	Gen. No. 34487
COMPLAINANT,	)	
V.	)	STIPULATION
JOHN P. JENSEN,	)	
RESPONDENT.	)	

IT IS STIPULATED by and between the parties hereto as follows:

I.

That any or all of the evidence contained in the transcript of evidence taken before the Committee on Inquiry on the 18th day of July, 1957 and the 6th day of August 1957 and transcribed and submitted by Court Reporter, Robert Knight and all testimony offered at the hearing before the Advisory Committee on the 23rd of May, 1958 and all depositions taken by either party since these proceedings were filed in the Supreme Court, may be offered by either party and shall be received in evidence the same as if said witness was present in court and testified, all subject to objections as to relevancy, competency or materiality.

II.

That the exhibits attached to the above evidence, including those forming a part of any deposition that

may be taken may be likewise offered in evidence subject to the same objections.

III.

It is the intention of the parties with reference to said exhibits to waive any foundation as far as proof of authenticity but subject to objections as to competency, materiality or relevancy.

IV.

Neither party shall be bound by any evidence as to its truth not offered by such party.

V.

It is further stipulated that either party may offer any further and additional evidence, supplemental to the evidence hereinbefore referred to in this stipulation, either by way of explanation, contradiction or otherwise or as proof or contradiction of any matter raised by the pleadings.

VI.

Notwithstanding the foregoing stipulation, both parties agree that any witness that is available, requested by the Referee, shall be called.

STATE, EX REL. NEBRASKA
STATE BAR ASSOCIATION.
COMPLAINANT,

BY s/ GERALD S. VITAMVAS,
Its Attorney.

JOHN P. JENSEN, RESPONDENT.

BY s/ CHARLES B. PAINE
s/ JOSEPH T. VOTAVA
s/ KENNETH H. DRYDEN